

*The Administration of
Justice under the East
India Company in
Bengal, Bihar and Orissa*

with an introduction by Dean Roscoe Pound

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UNDER THE EAST-INDIA COMPANY
IN BENGAL, BIHAR AND ORISSA



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JUSTICE UNDER THE
EAST - INDIA COMPANY IN
BENGAL, BIHAR AND ORISSA

5870

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INTRODUCTION

PERHAPS the most significant feature of the science of law today is the functional attitude or, to put it better, approach, toward the whole regime of adjusting relations and ordering conduct by systematic application of the force of politically organized society, toward the authoritative materials of deciding and of prescribing or prohibiting terms of conduct by which that regime is maintained, and toward the judicial and administrative processes in which those materials are interpreted and applied. Functional problems of social control are raised and discussed where formerly the problems of legal order were thought of as ethical abstract problems, and all problems of the legal order are approached functionally.

It used to be thought the task of the jurist was to systematize the body of authoritative legal precepts so as, in Bentham's phrase, to make them "cognoscible", i.e., teachable and intelligible to students, practitioners, and judges. If he turned to philosophical jurisprudence he might seek to discover and lay out a universal system of ethically ideal rules or precepts as models for legislatures or for courts.

Today we understand that no amount of authority to make rules of law will guarantee that the rules when made will achieve the purposes for which they have been formulated and promulgated. ⁹ Legal precepts will not enforce or apply themselves. The machinery of the legal order is no less important than the rules by which the legal order is to be maintained as an order of justice. Increasingly jurists have been finding it necessary to study the organization of courts, the organization of the judiciary department of a modern state, the system of tribunals in which relations are adjusted and conduct is ordered by law; selection, mode of choice and tenure of judges; organization of the administrative work of the courts; and organization, education, training and discipline of those who assist in the administration of justice as advocates, agents for litigation, advisors, or conveyancers.

When, at their independence Americans had to settle the machinery of justice for themselves, on the basis of what they

had received from England or had worked out on English lines subject to approval of the English Privy Council, no one appreciated what had to be taken account of in the way of the machinery of justice as we do now. Men's eyes were fixed on the content of laws rather than on the application and enforcement of laws. To no small extent, the system of courts, the selection and tenure of judges, the organization and conduct of the administrative work of the courts, and the training and organization of the legal profession simply grew up to local adaptations of the outgrown seventeenth century English patterns. Thus we made many mistakes which it has often proved a difficult and painful process to correct. Many of these mistakes still impair the administration of justice in difficult parts of the land.

A settled learned tradition of the Western world since the Renaissance forbade ignoring of any item of the history or institutions of ancient Rome. Hence, I suspect, the last century in Europe and America had studied more carefully the machinery of justice in Rome and its workings as disclosed in the Roman law books and Latin literature than contemporary machinery of administering justice and its workings in action. It is a significant evidence of real progress in the science of law that in free India of the second half of the present century we are getting in Mr. Patra's text a history of the administration of justice in a leading jurisdiction in India instead of history of the law, i.e. of the statutory and judicial and doctrinal patterns of decisions and starting points for legal reasoning, leaving the law in action to take care of itself. Such a study is of more than local importance. It yields materials which must be utilized in comparative law. But it is of prime value at home where it can give a trustworthy historical picture of what the Indian legislator and judge and text-writer must start from.

Mr. Justice Holmes has reminded us that while historical continuity is not a duty it is a necessity. We must work with the materials with which history has provided us even if we must reshape and mould them continually to new tasks. If in the reshaping and moulding process we apply reason to experience we must still test reason by experience and for that experience we look to history.

As to organization of the judiciary, the system of courts in

partition matters the opinions of the Pundits were sought for in cases of Hindu Zamindars and Talookdars, and the precepts of Mahomedan law in cases of Muslim Zamindars and Talookdars. The paper of adjustment, drawn up by the Gomestahs of the Canongos and signed by both the parties at the instance of the Controller, would be laid before the Nawab. The Nawab then passed his decree upon it and attested it by his own signature. Several of the causes of this nature were at the request of the parties referred by the Controller direct to the Adawlut-ul-Alia where they were settled.

The Controller of the Khalsa also settled the questions of the caste of the Hindus after having considered the opinions of the Pundits in the matter.

Foujdars were appointed on the part of His Majesty for the suppression of highwaymen, murderers and thieves and for the protection of the country. The foudary of the city of Moorshedabad was held immediately by the Nazim of the Province, who appointed a Foujdar on his part for the suppression and punishment of evil-doers and offenders. This court was known by the name of Cuchery Foujdary.

Attending to the occurrences of the town of Moorshedabad was with the Nazim the first part of his daily duty. In cases of murder and robbery necessary orders were issued to the officer for the discovery of the offenders. Occurrences happening at the Tannahs were communicated by the Tannahdars to the Foujdars of the city who having acquainted the Nazim with them relieved his orders and acted accordingly. Similarly, the Mehldars or Wardens of the city reported to the Foujdar or Tannahdars of occurrences happening in their respective jurisdictions.

The sentences of death and other punishments passed by the Nawab on the day or days of public assembly in conjunction with the Kazi, Moofiti and other officers were executed by the Foujdar. In the foudary no Ijlass or assembly of learned men was called.

In the town of Dacca, the Naib Nazim was in the place of the Nazim. The Naib Nazim's Court there had the combined jurisdictions of the Dewanny Adawlut and the Adawlut-ul-Alia of the city of Moorshedabad. The foudary court for the town.

of Dacca was called the Shehr-Aminy, while that of the mofussil was named the Khasnaveese.

At Hughly, Akbernagur, Rungpur, Sylhet and Chittagong there were three types of courts. The Foujdars and Tannahdars held the court of justice known as the Cuchery Adawlut. The Kazi's Court was known as the Mohokema Keza. The Foujdars and Tannahdars who executed the office of the Naib Nazim also held the foudjary court. These foudjary courts were not full courts and were only for bringing up the parties sending peons and issuing accounts of proceedings.

At Boosna, Jessore, and Rangamutty there were only two types of courts; the foudjary court and the Kazi's court.

In the far off countryside sometimes the Kazi's was the only court subsisting. The Kazi or his deputy took cognisance of the causes unconnected with the revenue. Sometimes the deputy himself decided small causes and transmitted those which were of consequence for the determination of his superior.

In the Pergunnah of Asidnagar, etc., which was in khas talook, the department of the foudjary was according to the orders of the Nazim conducted by the Darogah of the foudjary for that district.

The mode of carrying into execution the decrees of the courts of justice in the Province in respect to the Town of Calcutta, was as follows: The dependencies of Calcutta were but small and the Englishmen and their dependants carried on their dealings in so circumspectful a manner that few complain'ts, it has been said, were preferred against them either to the Nazim or to the Adawlut-ul-Alia. But when one was made, the Englishmen's vakils appeared either before the Nawab or the Adawlut-ul-Alia, and replied to the allegations of the complainant; or they satisfied him and delivered in the deed of adjustment. It sometimes happened that orders were issued either to the foudjardar at Hughly or to the Governor of Calcutta upon which they satisfied the complainant on the spot. In cases where any inhabitants of Calcutta removed from there on their business and went somewhere into the country according to their occasions any person complained against them the Agent of the Englishmen did not interfere in such cases. It never was known

to the Nawab, it has been asserted, that the Englishmen had, at any time before their elevation, put to death by their own mode of trial either a Mahomedan or a Hindu for any offence. This mode of conduct was observed with the English, the Manuscript says, from the time of the Nawab Jaffier Khan till the Peace concluded with the Nawab Serajeddoula.⁵ A Naib Kazi resided in Calcutta to execute the function of that department.

The names and processes of the Courts of Justice in Orissa were the same as those in Bengal with this difference that there subsisted no separate Dewanny Adawlut.

The names and processes of the Courts of Justice in Bihar were also the same as those in Bengal with this difference that the Chibolero-Cutwali stood in the room of the foudjary at Moorshedabad and that in this court there were four or five Mooftis and sometimes even a greater number. In Bihar there was a separate court of Dewanny Adawlut.

In the sixties of the 18th century Harry Verelst witnessed the following type of judiciary to have existed in Burdwan :⁶,

1. Sudder Cuchery, receiving land-rents and revenues of the division ; adjusting all accounts relative to them ; confirming all sales and purchases of land and property under its jurisdiction ; settling differences between landlord and tenant ; and issuing all orders respecting rents and revenues of the division.

2. Buxey Dustore, superintending the conduct of all forces, guards, and other persons employed for the protection of the division, prevention of thefts and disturbances of the peace of the people ; controlling their actions ; paying for this establishment of the general administration of the division and enforcing their obedience.

3. Foudjary, administering criminal law even in cases involving capital punishment.

4. Burrah Adawlut, administering law in civil causes in-

⁵ The Company's treaty with Seraj was dated February, 1757. The battle of Plassey ended in victory for the English on June 23, 1757

⁶ *View of the Rise, Progress and Present State of the English Government of Bengal*, 1773, appendix, pp. 219-20

volving an amount exceeding Rs. 50/-.

5. Ameen Dustore, entertaining complaints regarding revenue matters and the conduct of revenue collectors; transmitting these complaints to the Sudder Cuchery for their decisions.

6. Chootah Adawlut, taking cognisance of all suits for debts not exceeding Rs. 50/- in value.

7. Bazee Zamin Dustore, settling all differences relative to charity lands and other public supports.

8. Bazee Jumma Dustore, taking cognisance of adulteries, illegal abortions, and other crimes more immediately concerning the peace and happiness of private families, grants for lands and public works for the accommodation of travelers such as tanks, ponds, and wells of water, and resting places. As the name implies, this court had a variety of functions both administrative and judicial, 'Bazee' meaning miscellaneous.

9. Karij Dustore, collecting revenue; also exercising an arbitration jurisdiction of compelling a landholder to compromise with his debtor in case the latter failed to pay in full.

The Committee of Circuit, again, while at Moorshedabad in 1772, observed⁷ the judiciary for the district of Moorshedabad to have been constituted as follows:

1. The Nazim, who as the Supreme Magistrate, presided personally at the trial of the capital offenders, and held a court every Sunday, called the Roz Adawlut.

2. The Dewan, who was supposed to decide cases relating to real estate or property in land, but who seldom exercised the jurisdiction in person.

3. The Darogah-i-Adawlut-ul-Alia, or Deputy of the Nazim in the Criminal Court, who took cognisance of quarrels, frays, and abuse, and also of all matters of property, excepting claims of land and inheritance.

4. The Darogah-i-Adawlut-Dewanny, or Deputy of the Dewan in Civil Court, was the judge of property in land.

⁷ Committee of Circuit's Letter, dated, Cossimbuzar, 15th August, 1772. National Library, Calcutta

5. The Foujdar, or Officer of Police, and Judge of all crimes not capital; the proofs of these last were taken before him, and reported to the Nazim for his judgment and sentence upon them.

6. The Kazi, who decided claims of inheritance or succession; he also performed the ceremonies of weddings, circumcision and funerals. He was assisted by the Moofti and Muhtasib in his Court.

7. The Muhtasib, who had cognisance of drunkenness, the vending of spirituous liquors and intoxicating drugs and the examination of false weights and measures.

8. The Moofti, who expounded the law for the Kazi, who, if he agreed, decided accordingly. If he disagreed, a reference was made to the Nazim, who called a Council of Jurisconsults. After hearing the parties and evidences, the Moofti wrote the *futwa* or the law applicable to the case in question, and the Kazi pronounced judgment accordingly. If either the Kazi or Muhtasib disapproved of the *futwa* the cause was referred to the Nazim, who summoned the Ijlâss or General Assembly, consisting of the Kazi, Moofti, Muhtasib, the Darogahs of the Adawlut, the Maulvies and all the persons learned in the law to meet and decide upon it. Their decision was final.

9. The Canongos or Registrars of the lands, to whom cases connected with the land were occasionally referred for decisions by the Nazim or Dewan or Darogah of the Dewanny.

10. The Cutwal or peace officer of the night, subordinate to the Foujdar.

Verelst in his book *View of the Rise, Progress and Present State of the English Government of Bengal, 1773*, says that the type of administration prevailing in Burdwan was the one that was prevailing at the time also in the other provinces of Bengal. Verelst⁸ had an intimate and personal knowledge of the subject. Hastings, too, while a member of the Committee of Circuit possessed an authority over the subject of administration of Moorshehabad which cannot be challenged. The apparent inconsistencies

⁸ Harry Verelst became Governor and President of Fort William on January 26, 1767, and was succeeded by John Cartier on December 24, 1769



in these two accounts, namely, Verelst's regarding Burdwan, and Hastings's regarding Moorshedabad, and in the one given in the Manuscript referred to earlier, may be explained by the observation that all the provinces of Bengal during the Nawab's regime could not have exactly the same type of judicial administration. While the type operating in Burdwan could legitimately differ from the one operating in Moorshedabad, the one and the same type governing a particular area, say, Moorshedabad, would be viewed differently by different observers. Thus the said Letter of the Committee of Circuit says that properly there were at Moorshedabad at the time three courts for the decision of civil causes, the Canongos being only made arbitrators by reference from other courts, and one for the police and criminal matters, the authority of the Muhtasib in the latter being too confined to be considered as an exception. The Letter further remarks that the courts did not always adhere to their prescribed bounds. When the vigilance of the Muslim Ruler was no longer there the civil courts not only encroached on each other's authority, but both civil and criminal courts often took cognisance of the same causes. The Letter however asserted that the Foujdary being a single judicature and the object of it being clearly defined, it was seldom known, but in time of anarchy, to encroach on the civil power. It was for a few years only, after the assassination of Serajedoula, that the Darogahs of the Adawlut-ul-Alia and of the Dewanny had been considered by the people as judges of the same causes, whether of real and personal property, and the parties chose their courts as it suited their interests. So much so, that in the year 1772 it was found that the Dewanny Adawlut was in effect the only tribunal functioning at Moorshedabad which was still the capital city of Bengal, Bihar and Orissa. The Adawlut-ul-Alia or the Court of the Nazim existed only in name.

The Zamindar did not act, except in special cases, as the judge-magistrate within the bounds of his zamindary. Ordinarily his judicial power was confined to the jurisdiction of a collector of revenue of those days. In this jurisdiction he exercised the power of detaining the tenants for non-payment of revenues. The local police officer or the Foujdar in charge of

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England in the era of colonization of America (the seventeenth century) was archaic. Coke's Fourth Institute, the treatise on the jurisdiction of courts, tells us of some ninety tribunals which the Judicature Act of 1873 reduced to three. Legislation taking effect in 1875 finally put the number at four. What was more unfortunate, in the formative era of American law and of American legal institutions the English system of centralized courts at Westminster and trial of issues of fact at circuit was not well adapted, nor easily adaptable to a pioneer society of small towns, of magnificent distances, and of slow, difficult and expensive means of travel. Hence it seemed necessary to set up a court at everyone's door.

Such courts were set up for districts of substantially equal size and population with judges who could sit nowhere else and hard and fast lines of jurisdiction. As population increased and there came to be metropolitan cities where a great many judges sat separately each with coequal power and no one above another, there came to be unseemly clashes, great waste of judicial power and yet no systematizing power or authority to assure the best use of judges and legislation and the recorded decisions of the courts. In less than one hundred years after independence the organization of courts in most of the states had produced chronic arrears in the dockets, clashes of judicial authority which could only be resolved by dilatory and expensive resort to the ultimate court, and a condition where the judges in one locality were grossly overworked while those in another had little or almost nothing to do. As late as 1906 it could be said in an address before the American Bar Association that the organization of courts in America was archaic. For a characteristic of the beginnings of law is multiplication of courts. Whenever some new situation calls for legal treatment the tendency is not only to provide a special law but to set up a special court for it.

In India there is the advantage of a better English model than we had in America. You start from an organization after the Judicature Act of 1873. American ingenuity has, however, devised a useful institution in the Judicial Council. In most of the states a body of judges, lawyers, business men, editors, leaders in industry and leaders in labor organizations variously constituted in different states has the task of advising the legislature

of defects in the law and in the administration of justice calling for legislation and advising the courts as to needed improvements in the rules of court. The powers of a judicial council are purely advisory. Much good has been achieved by this institution in some of the most important states. It has proved specially important in enabling courts to exercise their rule-making function to the best advantage.

As to selection, mode of choice, and tenure of judges, India starts with the sound system which obtained under British rule. But so did we in America. With us false ideas as to pure democracy and the exigencies of party politics led in the era of frontier ideas during the process of expansion across the continent to a regime of an elective, short-term judiciary which has done much harm to American administration of justice. This unhappy departure from the common-law tradition of the judiciary is being slowly and painfully corrected. A few states and the federal government did not depart from the English model. But the temptation to put the bench into politics has been heavy. Here America can only furnish the warning of a bad example.

In the English polity the judges and administrative officials and all the clerical staff of the courts were paid in fees. This led under the ideas of estates in offices to a system under which appointments in the administrative and clerical position in the administration of justice were matters of crown favour or political patronage. In the beginnings of the administration of justice in America this system was brought over to the colonies and although much and often reformed since independence, has left its mark upon the organization of the administrative work of the courts.

In the federal courts and in a few states this matter has been turned over entirely to the courts to be controlled by rules made by the judges, since a century and a half of experience of statutory regulation has proved to keep the administrative side of the machinery of justice in party politics and made it needlessly expensive and by no means so efficient as it ought to be. Here is something which students of the administration of justice should be looking into everywhere.

India has a great advantage in coming to independence after laying down detailed provisions as to legal procedure by legis-

lative enactment had been given up in England and rules of court made or promulgated by the judges had become the settled practice. What statutory prescribing of details of procedure may lead to was illustrated by the New York Code of Civil Procedure as it stood till the third decade of the present century. It ran to over thirtyfour hundred sections and Mr. Hornblower used to say of it that it made detailed provision for every act of a judge from the time he entered the court house except to fix the exact peg on which he should hang his hat. Legislative bodies under political pressure or at the instance of organized groups or persistent individuals have a tendency to enact detailed rules for particular situations or states of fact without considering the effect upon the system of justice as a whole. Thus procedure becomes cumbersome and complicated, and amendment or abrogation by statute becomes very difficult. The English system of regulations of details of procedure by rules of court was a great step forward in the administration of justice in the English-speaking world. But America indicates that in democratic polities it will take great vigilance on the part of the legal profession to prevent legislative tinkering from undoing it.

Of special importance for independent India is the organization, training, and discipline of the legal profession. Above all, the administration of justice calls for recognition and maintenance of the lawyer's calling as a profession. By a profession we mean an organized body of men pursuing a learned art as a common calling in the spirit of a public service. Experience has shown that law depends upon lawyers. Every Utopia that has been written has pictured an ideal society without lawyers. But in the history of civilization, economic and social development have carried with them development of law, as distinguished from laws, and of lawyers. William Penn sought to found a commonwealth in which there should be no need of law or of lawyers. There was to be a system of neighbours acting as arbitrators to settle disputes, but in an ideal society of God-fearing men there were to be no disputes to settle. Yet within one hundred years the colony he founded had grown to a great province, destined to be a great state, and along with it had grown up a notable bar which because of its ability and learning had established the term "Philadelphia lawyer" in the vernacular

for a practitioner equal to solution of exceptionally difficult legal problems. Marx believed that with the disappearance of classes law "would wither away". Pashukanis expounding him believed that in the society of the future there would be no laws. There would only be administrative orders. But the Soviet polity soon learned of the need of law and laws in an economically organized society, and after some experiments of doing without lawyers came to a system of guilds of what we can only call lawyers.

So much of what is set forth in the history of administration of justice in colonial Bengal recalls what we read of administration of justice in colonial America that one is constantly tempted to make comparisons.

The details are very different. But the separation of judicial from executive functions and committing of judicial tasks to trained and independent judges came to be accepted in America as axiomatic and has been accepted in India as part of the constitutional polity. But, as it will be needful to speak of in another connection, the rise of the welfare or service state and multiplicity of administrative functions in the government of today have been seriously affecting the accepted constitutional theory in America and one can imagine that it may be fortunate that the constitutional separation was established in India in the twentieth instead of at the end of the eighteenth century and is to be carried out in an era of functional thinking of today rather than of the rigidly analytical historical thinking of the last century.

The author refers to expensiveness of the justice administered during the period covered. India is not alone in having to wrestle with the high cost of justice in a time when the welfare state is making ever increasing demands upon the proceeds of taxation.

Another problem which, if not universal, is general in the common-law world is the common-law doctrine of the Rule of Law, or, as I prefer to call it, the Supremacy of Law in view of the increasing multiplication and all-embracing activities of administrative agencies in the Government of today. Indeed, the general tendency of the time to develop constitutional guarantees of fundamental human expectations on the model of American

bills of rights rather than of Continental Declarations of the Rights of Man, is making the problem well nigh universal. It has become fashionable to decry Dicey's Rule of Law. But experience of substantially legally unchecked action of administrative agencies in America has been casting doubt on the administrative omniscience for quasi-judicial determinations preached by writers upon politics. In his recent book *Law and Social Change in Contemporary Britain*, Professor Friedmann tells us that two principles are essential to democratic society: (1) The safeguarding of protected individual interests by impartial judicial authority and (2) the principle of equality before the law of those who engage in comparable legal transactions and enterprises. The sound kernel of Dicey's doctrine is that the common-law judicial process goes far to secure these where the administrative process of adjudication does not in the United States.

The author takes up subjects which make a contribution to comparative law in the best sense of that term.

It has been a privilege to read it and think about it.

ROSCOE POUND

Harvard Law School,
October, 1953.

THE APPROACH

THE BRITISH administration of India is over. One of the most important chapters of India's history has thus closed. The British having quitted, we have been in a position, since the 15th day of August, 1947, to review their administration more dispassionately than before. Now, when we decide to begin a new era in the administration of the country it may be useful for us, it is submitted, to weigh the *pros* and *cons* of the system that erstwhile existed and also to attempt to feel the spirit of the said administration in order to enable ourselves to retain in our future set-up the elements that were good and to discard those that may appear harmful.

The term 'administration of justice' means the dispensation of justice by the judges, the steady development and adaptation of statute, case and common law to meet the changing sets of circumstances upon which they have to decide. It also means organisation of the personnel and routine methods for running a variegated network of courts and their offices instituted in a country.¹

The scope of the present study, however, will be an appreciation of the work done in the field of legal administration by some of the principal judicial institutions operating under the Company's administration in the Presidency of Fort William in Bengal. To use an expression of Professor Edwin W. Patterson, the approach will be an 'external' one as distinct from the 'internal' approach of the analytical jurisprudence.² The legal administration in question will be viewed against the background of the then society and the ethical, political and social beliefs of the time. Where the jurisdictional evolution of a particular institution has been traced, it has been done as a study of its functional evolution.

¹ Charles Eden: The Case for a Ministry of Justice, *World Review*, April, 1946

² Edwin W. Patterson: *Jurisprudence*, 1953, p. 2

The sources of the materials catering for the present text have been mainly the manuscript records and printed reports extant in the Hon'ble High Court at Calcutta.

The materials collected and collated by Herbert Cowell: *Tagore Law Lectures; History and Constitution of the Courts and Legislative Authorities in India* (6th edn., 1936); by the Venerable Walter Kelly Firminger: "Introduction to the Bengal Portion of the Fifth Report from the Select Committee of the House of Commons on the Affairs of the East-India Company," dated 28 July, 1812, (1917); by Sir Charles Fawcett: *The First Century of British Justice in India* (Oxford, 1934); by Dr. Indu Bhusan Banerjee: *The Supreme Court in Conflict* (1940); and by Professor Debendra Nath Banerjee: *The Early Administrative System of the East India Company in Bengal* (Vol. 1, 1765-74, 1943), among other authorities, have not been made use of except in so far as such materials were found by coincidence indispensable for a functional approach of the subject.

Moreover, Herbert Cowell in his lectures has dwelt on a variety of institutions, legislative and judicial, from the point of view of their history and constitution. In view of the vastness of the subject undertaken and of the angle of vision adopted by him, Herbert Cowell's study could not be as much concentrative as with a functional attitude one would expect.

The Venerable Firminger's *Introduction to the Bengal Portion of the Fifth Report*, in its turn, intends to bring the story of the evolution of the civil administration of the East-India Company in Bengal only down to the point at which a study of the Fifth Report of the Select Committee may commence.

Sir Charles Fawcett, again, has covered, as the title of his treatise shows, the first century of British justice in India with a particular reference to the Isles of Bombay ending in a period when British justice in Bengal had not yet begun except for the Factory of Fort William. The British authorities took possession of the island of Bombay on 18 February, 1665, and the East-India Company came to possess it on 23 September, 1668, by virtue of a transfer by the King of England dated 27 March, 1668. Sir Charles's text thus concerned a period and covered a jurisdiction not shared in common by the present work.

Dr. Indu Bhusan Banerjee's monograph likewise centres round the conflict between the Supreme Court and the Supreme Council covering the period 1774-81.

Professor Debendra Nath Banerjee's research has explored the genesis of some of the institutions covered by the present treatise and his work (Vol. I 1765-74) will be of immense use to those interested in the study of the early constitutional history of India under British rule. But, as has been noted before, the present work will confine itself to the study of the legal administration of the Presidency of Bengal rendered by some of the principal judicial institutions of the Presidency for the whole of the period of their existence as viewed from the pragmatic standpoint.

Confining himself to the functional attitude, the writer of the present text has not adverted to the celebrated trial of Maharajah Nuncomar and other cases which are otherwise notable.

The period ends with the establishment of the High Court of Judicature at Fort William in Bengal.

Lastly, it is well known that the administration of revenue and the administration of justice had been for a period in the history of Bengal, Bihar and Orissa inextricably mixed, and this admixture occasionally creates some confusion on the part of the lay reader. Attempts have, therefore, been made for the text, to live 'within justice' without treading on the ground of public revenue.

Our treatment of the subject will be as follows :

Section I	The Courts of Justice in Bengal, Bihar and Orissa during the Nawab's Regime
Section II	The Mayor's Court at Calcutta
Section III	The Sudder Dewanny Adawlut
Section IV	The Sudder Nizamut Adawlut
Section V	The Supreme Court of Judicature at Fort William in Bengal
Section VI	The Courts of Circuit
Section VII	The Provincial Courts of Appeal
Section VIII	The Laws in Operation
Section IX	General Observations

THE COURTS OF JUSTICE IN BENGAL, BIHAR AND ORISSA DURING THE NAWAB'S REGIME

IN THE possession of Messrs. C. O. Book Stall, New and Antiquarian Booksellers, 9, Shyama Charan De Street, Calcutta, there is a manuscript entitled "Treatise on the Government of Bengal, Bahar and Orissa, with respect to the Revenues and Administration of Justice from the time of Jaffier Khan to that of Serajeddoula (Translated from the Persian)". Dr. S. N. Sen, Keeper of the Records, (under the later designation, Director of Archives), Government of India, in his letter No. 521, Imperial Record Department, New Delhi, dated 20 March, 1941, addressed to the proprietor,¹ C. O. Book Stall, says that the volume is a genuine one and that the manuscript has not yet been published. According to Dr. Sen, the manuscript contains important details about the revenue system and administration of justice under the Nawabs of Bengal and is likely to be of considerable use to students of the Muslim Administration System in Bengal.

The Manuscript comprising 96 pages has the following index as to its contents:

First, of the Province of Bengal :

Its settlement and general administration	1—19
Of the mint, and of gold and silver coinage	23—28
Of the customs	28—37
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¹ The author is obliged to the proprietor, C. O. Book Stall, for his allowing him to make use of the Manuscript

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The authorship of the Manuscript has not yet been discovered nor the date of its writing ascertained. The authenticity of the Manuscript lies, in addition to the verdict it has received from Dr. Sen, now decidedly one of the authorities on the subject, in the fact that the Treatise contains nothing inconsistent with the facts hitherto established by modern historical researches. Primarily resting on this Treatise and two other authoritative accounts an attempt will herein be made to give in brief outlines a picture of the system of administration of justice operating in Bengal, Bihar and Orissa in the period immediately preceding the advent of the British administration of justice in these provinces.

According to this Treatise, the Department of Justice, by the Royal Regulations, belonged wholly to the Nazim, the idea of the *Nizamut* including Justice, Protection and the Defence of the country. His Majesty's orders were that the Nazim for the time being should administer justice conjointly with the Kazi, Moofiti and the Ulama (learned men) and in the presence of the Emperor's Intelligencers and the Royal Spy. But because of administrative and revenue pre-occupations the Nazim was prevented from attending to the representations of the parties or examining fully into the evidence of witnesses, etc., and he appointed a Darogah and officers to investigate fully all kinds of causes and to report them to the Nawab. This Court was known by the name of the Adawlut-ul-Alia.

On the day on which His Majesty (Shah) at the central seat of the Government (Delhi) sat in public assembly, the Nazim also sat at Moorshedabad conjointly with the Dewan of the Province, and the Dewan Buital, who was a person appointed by His Majesty to receive the estates of persons dying without heirs, together with the Kazi, the Mufti, the Sadr and Ulama or learned men. There would be also present in the assembly the Controller of the Khalsa. Of the *Nizamut*, were present the Controller, the Intelligencers of His Majesty, the Canongos,

the Nazir, the Royal Spy, the Foujdar of the city of Moorshe-
dabad with his officers and the Cutwal. Before this assembly
the Darogah of the Adawlut-ul-Alia appeared with the officers
of the court and laid before the Nawab those causes which had
been settled to the mutual satisfaction of the parties. He in
a like manner laid before the Nazim such causes as remained
unsettled or regarding which objections were made by the
parties. Thereupon the Nawab with the advice of the Kazi
and Mufti and Ulama enquired into and passed decrees upon
the causes according to the law. The Darogah of the Adawlut
made out an abstract of the complaints of the suitors, or some-
times produced the complaints at length which he got heard
and signed. Causes respecting the collection of the revenue
were referred to the Controller of the Khalsa, and those relat-
ing to the payment of troops to the Superintendent of the
Nizamut. Causes cognisable by the Foujdary such as murders,
robbery or theft committed by any person of whatever caste
were tried according to the Mahomedan Law.

The Kazi, sitting in his own court, known as the Dural Keza
and Mohokema Keza would conduct the precepts of the Maho-
medan law and settle matters of dispute according to the law.
The Kazi's tribunal at Moorshedabad took cognisance of causes
concerning marriage, marriage contracts and settlements, the di-
vision of inheritance, testaments and the appointment of Maho-
medan Mutawallis. The Kazi also attested with his seal all
papers and deeds of release, and of compromise or concord. He
sat in his tribunal with another learned man and passed decisions.
He sometimes directed his deputies to hold local inquiry re-
garding complaints with the help of the men of the locality.
The Kazi's department was independent of the Nazim except
in very remarkable cases.

The Nawab Jaffier Khan is said to have liked to see himself
always employed in conducting and in administering justice
in causes of land and revenue, but often had to refer causes of
this nature to the Controller of the Khalsa. The Nawab Sujah-
eddien Mahomed Khan, considering that it would be physi-
cally impossible for him to attend to all the causes and also
that, if the authority of administering justice in matters of
land and revenue did not belong to the Controller of the Khalsa

it would prove detrimental to the interests of revenue, gave to the Controller of the Khalsa the power of administering justice in the causes of land and rent. The Nawabs Jaffier Khan² and Shujah-eddien³ and Alliverde Khan⁴ conducted the administration of justice on the same plan. The plan was continued by Serajeddoula but with this difference, that instead of one day he sat two days for the purpose of judicial administration.

The Controller, by the Nawab's order, appointed a Darogah and officers to examine into causes cognisable by him. The court of this Darogah was called the Dewanny Adawlut. The Darogah of the Court laid before the Controller the causes respecting the disputes of zamindars or disputed limits or the revenue land of the raiyats and the like, after the plaint had been prepared by the complainant and the defendant had put in his reply. The Controller passed judgment himself, but in many causes desired to be assisted with the opinions of the Sheristadars and the Gomestahs of the Canongos and others. In cases of disputes concerning limits and boundaries an aumeen accompanied by the Gomestahs of the Canongos went to the spot and made local inquiry. Matters of account were referred to the Mutsuddi Dewanny and the Canongos who having minutely examined them prepared and delivered in their report to the Controller, who having informed himself of every particular after confronting parties and hearing what each of them had to say, passed judgment according to the law and usage. Arbitration was widely resorted to under the auspices of the Controller.

The Talookdars of a zamindary in their disputes of boundaries referred to the Zamindar for decision without applying to the Khalsa. The Zamindar settled such matters, and if the parties were dissatisfied with his decision, they could bring their cause before the Controller of the Khalsa who decided it in the presence of the Zamindar.

The Nazim for the time dispossessed and appointed Zamindars and Talookdars according to the findings of the Controller. The said matters in this way were not cognisable by the regular courts of justice. In questions pertaining to succession and

² d. 1134 B.S. (1727-28 A.D.)

⁴ d. 1162 B.S. (1755-56 A.D.)

³ d. 1146 B.S. (1739-40 A.D.)

a district was responsible for the criminal administration of the whole of the district. The local tannahdars with their armed men helped the Foujdar. The Zamindar or Zamindars as a matter of duty assisted the Foujdar in the apprehension of robbers and in executing the measures deemed suitable for the preservation of law and order in the area. Only the Zamindars with special sanads from the Nazim acted as the Foudjars for their zamindaries. The Zamindar of Burdwan was a Foujdar empowered to function as the Magistrate.⁹ The sanad granted to Ramkunt under the seal of the Nawab Serfraz Khan¹⁰ dated A.D. 1735 conferred upon the recipient the service of the zamindary of the Pergunnah Rajshahy. This sanad conferred on the Zamindar the duty of apprehending thieves within his area but did not authorise him to administer civil or criminal justice which administration was left to the Foujdar and other institutions established for the purpose.

During the Muslim administration the powers of a Kazi were restricted to the trial of a particular class of cases or to a particular area, and there were no courts without judges equipped with the enabling sanads. The *Hedaya* and the *Futawa Alumgiri*, among other works on Muslim law, were very specific on the necessity of duly appointed Kazis.¹¹ The Marathi sanads executed in the middle of the 17th century A.D. prescribe the duties of the Kazis in the Deccan as trying law-suits, putting down oppressions and quarrels, arranging for the marriage of orphan girls, and dividing the heritage of dead men according to canon law. Brahmanic courts were also functioning sanctioned by the Emperor, and these courts followed Manu and

⁹ Minute of Warren Hastings, dated 7 December, 1775, cited, G. W. Forrest: *Selections from the Letters, Despatches and other State Papers*, preserved in the Foreign Department of the Government of India, 1772-85, Calcutta, 1890, Vol. II, pp. 454-55.

¹⁰ The sanad was granted under the seal of Serfraz Khan the Dewan of the Soobah of Bengal, dated the 27th of the month of Rumzan in the 17th year of the reign of His Majesty Mohummud Shah.

¹¹ *Futawa Alumgiri*—A collection of Opinions and Precepts of Mohamadan Law—compiled by the Sheikh Nizam and other Learned Men by Command of the Emperor Aurungzeb Alumgir, Calcutta, 1828-35 (Arabic version); for some details as to the *Futawa Alumgiri* and the *Hedaya*, see 'General Observations', *post*

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other Hindu law-givers so far as the Hindu laws were left operative.¹²

The Company's 'supravisors' were asked in 1769 to summon the officers of justice, and Kazis who were established by the Mahomedan Law, as also the Brahmins, who administered justice among the Hindus, to appear and produce their sanads, or authority for acting, and register them. According to the tenor of the Letter of Instruction from the Resident at the Durbar to the several 'supravisors', appointed in 1769, it appears that the Brahmin judges in Bengal, Bihar and Orissa had not been appointed by the ruler but were elected by their caste. These Brahmin judges, according to the said Letter, only adjudged on cases involving the forfeiture of caste. They were not given the authority of restoration thereof. The power of restoration had been the prerogative of the Muslim ruler. Only in determination of the forfeiture of caste Brahmins were treated as the natural judges of the Hindus.¹³ A Brahmin Pundit was never vested with a criminal jurisdiction whose exercise was the exclusive function of the Mahomedan gentlemen learned in the law.¹⁴ The Mahomedan gentlemen learned in the law and concerned in the dispensation of justice had had the common appellation of the Kazi. The Kazi's trial and procedure are considered, in these days, to have been all rough and ready in their dispatch as distinguished from the rigid technicalities of the courts of law prevailing in the civilised states of today. This allegation against the Mahomedan dispensers of justice is absolutely without a foundation.¹⁵ The *futwabs* of the Moulvies as are extant till date in the records of the High Court at Calcutta, and the pattern of which will be seen in the Section of the Sudder Nizamut Adawlut, Sec-

¹² Jadunath Sarkar: *Mughal Administration*, 4th edn., Calcutta, 1952, pp. 96-101

¹³ Extract of Proceedings of the President and Select Committee on 16th August, 1769

¹⁴ See Muhammad Basheer Ahmad: *The Administration of Justice in Medieval India*, 1941, 83

¹⁵ *Hedaya Farsee*: Book XX (Charles Hamilton's Translation, Vol. II, London, 1791, 612-24); see also Extract of a Letter from the Committee of Council to the Council at Fort William, dated at Cossimbuzar, 15th August, 1772, cited, Colebrooke, *Digest of the Regulations*, p. 9

tion IV, *post*, are sufficient to establish that the Mahomedan courts of law in their ideal state were as much meticulous and earnest in their treatment and procedure as the orthodox courts of law of to-day. The Kazis' courts were *courts of record* in the sense that whenever a person was appointed to the office of a Kazi it was incumbent on him to demand the *dewan* of the former Kazi. By the *dewan* was meant the bags in which the records and other papers were kept ; for those had to be compulsorily preserved to serve as vouchers on future occasions. These bags had to remain in the hands of the person possessing the judicial authority. The records were the instruments of justice and were meant to be devoted to the public.¹⁶ The allowances of a Kazi were to be defrayed, in an ideal state of administration, from the public treasury.¹⁷ About the duties, demeanours and equipment of a Kazi see *Hedaya Farsee*, Book XX (Hamilton's Translation, London, 1791, Vol. II, 612-24).¹⁸ The Mahomedan administration of justice seems to have stood the test of time and political vicissitudes because of the development and survival of a highly trained professional class.¹⁹ Even as late as the seventeenth century we find Hindu scholars compiling digests and writing commentaries on Hindu Criminal Law long after its abrogation by the Mahomedan rulers. When Warren Hastings took to establishing the new form of judicature and giving laws to the people of Bengal, Bihar and Orissa he found that Hindu Law was preserved and taught by the pundits all over India who received public endowments and benefactions from the States and the people, in addition to the great regards shown to them by all concerned. It would be a tyranny, it was held by Warren Hastings, to impose foreign laws on the people here. Mahomedan Law was found to be governing by its own right at least one-fourth of the people of the Province of Bengal, though not, according to him, as comprehensive and as well defined as the laws of the European States

¹⁶ *Hedaya Farsee* : Book XX (Hamilton's Translation, London, 1791, II, 617-18)

¹⁷ *Hedaya Farsee* : Book XLIV (Hamilton's Translation, London, 1791, Vol. IV, 127)

¹⁸ See also *Fulawa Alumgiri* (Arabic version), Book XXIV: Adub-ool-kazee

¹⁹ Cf. John Henry Wigmore: *A Panorama of the World's Legal Systems*, 1928, Vol. III, p. 1129

of the time.²⁰ The new Government's apathy however was responsible for the decadence in the literary and legal culture in the provinces. For the first fifty years of the British rule the intellectual development of the Indians was entirely neglected by the Government.²¹ Mr. Strachey in the beginning of the 19th century consequentially found that in Midnapur there had been no schools or seminaries teaching Hindu or Mahomedan Law. Only at the sad'r station students, aspiring to be vakils or law officers, living in the families of the Amlah or the pleaders were trying to get some idea of the Mahomedan Law in operation. The Judge-Magistrate of Burdwan observed that in the districts in the neighbourhood of Burdwan only in Nuddeah Hindu Law was being taught. The Magistrates of the 24 Pergunnahs and of the districts adjacent to Calcutta found that in the districts under their jurisdiction there were only 190 Sanskrit seminaries in which Hindu Law, grammar, and metaphysics were taught. To their knowledge, only one seminary was there teaching Mahomedan Law. Warren Hastings had established the Calcutta Madrassah as early as 1781 in order to produce capable Indians versed in Mahomedan Law and able to help the European judges in the judicial administration of the country in the capacity of Mooftis. With the like end in view, *apropos* Hindu Law, Jonathan Duncan, the Resident at Benares, established the Benares Sanscrit College in 1792.

During the Mahomedan period the Mahomedan Law of crimes was the sole criminal law for the country.²² The Hindus had been left undisturbed in the governance of the personal causes by their personal laws.²³ Only to this extent the non-Muslim subjects (zimmee) of a Muslim State were not subject to the laws of Islam.²⁴ Their legal relations *inter se* were to be regulated according to precepts of their faith in cases of

²⁰ Warren Hastings's Letter to Lord Mansfield, March 2, 1774

²¹ The Minute of Lord Moira on the Judicial Administration of the Presidency of Fort William, dated 2 October, 1815

²² Charles Hamilton: *Hedaya*, London, 1791, Vol. I, Preliminary Discourse, lxxxvi

²³ Charles Hamilton: *Hedaya*, Vol. I, 1791, Preliminary Discourse. See *Futawd Alumgiri*, Book XIII: Kitab Siyur

²⁴ 'Zimmee' meant an infidel subject of the Mussulman Government

succession, marriage, adoption, caste and the like. Such portion of the civil law of the Mahomedans as related to matters of trade, barter, exchange, sale, contract and the like, was however made applicable to Muslims and non-Muslims alike. In case of a dispute in the realm of civil law, too, if either of the parties were a Mahomedan, Mahomedan Law would prevail. Both as suitors and as witnesses the Hindu subjects were handicapped *vis-a-vis* the Mahomedan.²⁵ This discrimination was sanctioned in precepts and also followed in practice.²⁶

Mahomedan Law is too vast a study for an evaluation in the light of the tenets of the modern jurisprudence. An attempt to that effect will, therefore, not be made. Mahomedan Law, however, as the penal code of the country of Bengal, Bihar and Orissa superseding the Hindu Law on the subject and immediately preceding the advent of the (Anglo-Indian) Indian Penal Code attracts and invites some comparison with the common traits of the modern law that have been accepted as reasonable in the society of our time. In such comparison we shall confine ourselves to the administration of the Mahomedan Law in the Courts of the Provinces of Bengal, Bihar and Orissa. The realm of comparison so confined, it may be inferred that of the several attributes of the law, namely, precision, flexibility, realism, reciprocity, moderation, projection and solidarity, the Mahomedan exponents of the law evinced a keen sense of precision and solidarity. Barring the provisions for discretionary sentences, precision in the orthodox jurisprudence of the Mahomedans could not admit of the moderation of the present-day jurisprudence. Solidarity in the shape of disinterestedness, as opposed to interestedness and uninterestedness, was considered a virtue as it is considered to-day, and did not leave any spacious field for the play of flexibility. The realism of the time justified the rigidity, instead of the flexibility. Only in the absence of any prescribed text on a particular fact-situation, the Kazis acted according to their sense of justice and injustice.

The rational strength of any particular system of law in ope-

²⁵ Charles Hamilton : *Hedaya*, Vol. I, 1791, Preliminary Discourse

²⁶ *Hedaya Farsee* : Book XXI (Charles Hamilton : *Hedaya*, Vol. I, 684, 690-91)

ration is to be found in its historical explanations, that is, in the discovery of sane and intelligent adjustments of means to an end. In those days of variable attitudes in the shape of differential treatments on the part of the executive officials, people had a craving for symmetrical reactions on the part of the Government to the actions of wrong-doers.²⁷ In accordance with the needs of the time, the Mahomedan jurists adopted the principle of the application of the fixed rule that was designed to be generally fair and ensured uniformity of treatment in preference to the adoption of the principle of investigating each case on its merits, with the possibility of arriving at a variable conclusion on the part of the judge concerned. The comprehensive Mahomedan jurisprudence provided for the guidance in all possible cases and left little for the trier to exercise his own reason, conscience or reflection. Mr. Justice Devlin is one of the jurists who have preferred this uniformity-of-treatment system to the individualisation process.²⁸ Excessive individualisation might frustrate the community's sense of equality before the law and would also impair the sense of moral responsibility on the part of the individuals. Moral rules, too, as has been pointed out by Dr. Potter in *The Quest of Justice*, have proved inadequate in human justice because such rules as humanly expressed have been found variable in content and uncertain in application. Quite justifiably, therefore, social ethics alone, as embodied in judicial or textual precedents, gave the law in question the force of sanction.²⁹

Roscoe Pound in *An Introduction to the Philosophy of Law* has traced no less than twelve ideas of the nature of the law which man has lived under.³⁰ The ideas emphasise one or more of the aspects of law. The ideas mentioned are those of divinity, traditionality, equitability, naturalness, immutability, agreeability, harmony, enforceability, utility, reciprocity, limitability, and acceptability of a particular piece of law or a particular system of law. Of these aspects of the law, the Mahomedan jurists were

²⁷ F. H. Lawson: *The Rational Strength of English Law*, 1951 p. 12

²⁸ Carter v. Minister of Health, [1950] 2 All E.R. 904

²⁹ Edmond N. Cahn: *The Sense of Injustice*, 1949, p. 106; see also Joseph Schacht: *The Origins of Muhammadan Jurisprudence*, 1950, p. 223

³⁰ See revised edition, 1953, pp. 24-47

guided by their sense of equitability and power of logical reasoning, and the Moulvies as we find them working in the Company's Courts, accepted and applied the recorded wisdom of the wise men of old who had learnt and prescribed the safe course for human conduct. Stability of rulings in the continuity of precedents has given in these days to experience and convenience in new situations.³¹ The Mahomedan period, however, did not witness the complexities of the fact-situations obtaining in the modern industrialised society, and logic in the shape of consistencies was the guiding factor, and the truth or justice of the legal premises was not questioned till the judicial administration of the Provinces of Bengal, Bihar and Orissa was taken over by the Englishmen.

The origin of the peculiarities of the Mahomedan as of every system of law has to be traced to the period when they originated. The oddities of a particular institution have had their justifications in point of time.³² The Islamic community as an organised society was intolerant of the existence of any rival group or community continuing its separate existence. The strangers in the circumstances had been hated where not annihilated or assimilated. Hence the testimony of a stranger uncorroborated by the evidence of the persons who were members of the "kin"-group was not found reliable, and the orthodox Mahomedan jurists retained the relics of the older customs of their community governing the law of crimes and evidence.³³

Retaliation in the form of authorised self-help must have in history preceded the procedure of conviction and reparation. For a considerable period of the human history thereafter *kisas* or retaliation must have operated as an alternative practice to reparation. Then for a time retaliation seems to have been replaced by conviction or reparation, in practice if not in theory. During the Mahomedan period however the law in force in Ben-

³¹ Konstam, J. Note: (1944) 60 Law Q. Rev. 232, and Holmes, J. cited, Stone: *Province and Function of Law*, 168. Sir R. Burrows: *Law Reporting*, (1942) 58 Law Q. Rev. 96

³² See, Joseph Schacht: *The Origins of Muhammadan Jurisprudence*, 1950, p. 223; see also Charles Hamilton; *Hedaya*, Vol. I (1791), Preliminary Discourse, xxxix-xliii

³³ *Hedaya Farsee*; Book XXI (Hamilton's Translation, London, 1791, Vol. II, 684, 690-91)

gal, Bihar and Orissa was yet passing through the second-mentioned phase in its evolution. Elsewhere in the ancient communities, with reference to time, reparation seems to have been recognised as the only tolerable mode of punishment, though ultimately to be replaced by penal sanction of the community bereft of all traces of individual loss, wrath and agony. The inherent instinct of self-help for the cause of self-redress had thus been elsewhere replaced, with reference to time, by the communal disapproval of the crime.

Crime for its penal sanction has had a variety of reactions in the community. Without attempting at enumerating them in any order of succession, chiefly because evolution in penal sanction did not follow any definite course, it may, on the basis of historical records, be held that of the several phases of punishment, namely, retaliation, ostracism, composition to the individual, clan or sovereign, deterrence, purification or penitence and attempts at enforced reformation, the Mahomedan jurisprudence retained in Bengal, Bihar and Orissa the traces of the phases of retaliation,³⁴ composition³⁵ and deterrence.³⁶ In the period concerned, the Mahomedan Law in Bengal, Bihar and Orissa had not yet passed the phase of personal retaliation, that is, retaliation to be exercised by the injured party itself instead of the State; neither did it enter the phase which allowed the State to exclusively exercise penal sanctions on the calculus of the principles of retaliation or reparation.

In the altered circumstances, that is, when the administration of Bengal, Bihar and Orissa was taken over by the English, the age-old peculiarities of the Mahomedan system appeared intolerable to the new sovereign rulers who proposed to alter the necessary law of evidence and of crimes in accordance with the principles of the present-day systems of the world. It was provided, for example,³⁷ that the religious tenets of witnesses would

³⁴ See for 'retaliation', *Hedaya Farsee*, Book XLIX (Hamilton's Translation, London, 1791, Vol. IV, 279-98)

³⁵ *Hedaya Farsee* Book XLIX (Hamilton's Translation, Vol. IV, 299-317)

³⁶ For 'fines', see *ibid.* Book L Chap. I (Hamilton's Translation, Vol. IV, 328-57); for 'imprisonment', see *Hedaya Farsee*, Books XVIII, XX, XXXV and XXXVII (Hamilton, Vol. II, 574, 624, Vol. III, 488, 525)

³⁷ Rules for the Guidance of the Nizamut Adawlut and the Courts of Circuit passed by the Governor-General in Council in the Revenue Depart-

no longer be considered as a bar to the conviction or condemnation of a prisoner; but in cases in which the evidence given on a trial would be deemed incompetent by the Mahomedan Law on the plea of the persons giving such evidence not being of the Mahomedan religion, the law officers of the Courts of Circuit would declare what would have been their *futwa*, supposing such witnesses had been of the Mahomedan persuasion and the Court of Nizamut Adawlut would pass such sentence as they would have passed had the witnesses for the prosecution been Mahomedans. The Mahomedan Law did not allow hanging of criminals, and death had to be allowed, for a period, by flagellation in Company's Courts. Later, death by flagellation had to be replaced by hanging.

The Mahomedan Law of *kisas* (retaliation) provided, as noted before, for the alternative system of payment of the price of blood or compromise. Records showing acceptance of retaliation to be exercised in person by the party injured instead of price of blood were not rare. The rules of retaliation for the application were not yet delegated to the Courts alone, and convictions, reparations and retaliation were accepted as the alternative practices of the community. The law that the next-of-kin to the person murdered should execute the sentence on the murderer also drew the attention of the Company's Government. "It would be", wrote Hastings, "difficult to put a case in which the absurdity of it should be more strongly illustrated than in one before us, of a mother condemned to perish by the hands of her own children for the murder of her husband. . . . They have pardoned their mother. They would have deserved death themselves, if they had been so utterly devoid of every feeling of humanity, as to have been able to administer it to her who gave them life."³⁸ According to the Mahomedan Law in force in Bengal, Bihar and Orissa in those days the intention of the criminal in a case of murder, again, was not accepted as the determining factor in awarding punishment. According to Aboo Huneefah, the importance of the weapon or the manner of murder irrespective of the intention on the part of the criminal was emphasised.

ment, on the 27th April, 1792

³⁸ Hastings's letter dated 1st July, 1773, recorded in Proceedings of Council, 3rd August, 1773

The Company's Government, however, in replacing this piece of Mahomedan Law accepted the principle of Yusuf and Mohamed who emphasised the importance of the criminal intention and not the manner or instrument of perpetration.³⁹ Relatives were also debarred from pardoning the offenders.⁴⁰ To the British administrators, the system of reparation, again, in the shape of payment of the price of blood at its full value of Rs. 10,000/— or fraction of it when so justified by the attenuating circumstances appeared archaic and unjustifiable, and they made the crimes in question a concern for the State instead of the injurer and the injured.⁴¹

Subject to above, *farmans* had sometimes been issued in terms differing from some of the categorical provisions of the law as contained in texts like the *Futawa Alungiri*. Thus, the Shahi *farmans* issued on 16 June, 1672, to the Diwan of Gujrat suggested the infliction of imprisonment instead of amputation,⁴² though in Bengal the punishment of mutilation and amputation was being followed till the year 1791 when by a Resolution of the Governor-General in Council it was ordained that the prisoner was to undergo hard labour for seven years where he was sentenced, in conformity to the *futwa* or opinion of the Mahomedan law officers, to lose one limb, and for fourteen years where to lose two limbs.⁴³ Prior to the passing of this Resolution in 1791 dacoits had actually to undergo the punishment of mutilation and amputation.⁴⁴ The *Calcutta Chronicle* of February 19, 1789, described how at Salkia, near Calcutta, 14 criminals had to undergo the sentence of mutilation and amputation on February 15 of the same year.

³⁹ Article 33 of the Regulation of 3rd December, 1790. This Article was preceded, *inter alia*, by the General Regulations made in 1772

⁴⁰ Article 34, *ibid*.

⁴¹ Extract from the Resolutions of the Governor-General in Council, passed on 9th October, 1791. Extract from the Proceedings of the Governor-General in Council in the Revenue Department, 13th April, 1792

⁴² Sir Jadunath Sarkar: *Mughal Administration*, Patna University Reader-ship Lectures, 1921, Second Series, pp. 13-9

⁴³ Extract from the Proceedings of the Governor-General in Council under date the 10th October, 1791

⁴⁴ The said Resolution was later incorporated in Regulation IX of 1793

II

THE MAYOR'S COURT AT CALCUTTA

QUEEN ELIZABETH's Charter of 31 December, 1600, gave "the Governor and Company of Merchants of London Trading into the East Indies", popularly known as the London East-India Company, some legislative authority empowering them to make such laws and orders as were necessary for the good government of the Company. For better advancement of the Company's interests, the activities of the personnel employed by the Company had to be regulated. The laws, orders and penalties of the Company had, however, to be reasonable and not repugnant to the laws of England for the time.¹ The Royal Charters of 31 May, 1609; 3 April, 1661; 27 March 1669; 9 August, 1683; and 7 October, 1693, recognised the same power of the Company. The Charter of 5 September, 1698, incorporated "The English Company Trading to the East Indies", popularly known as the English East-India Company. "The United Company of Merchants of England Trading to the East Indies" emerged as a new Company from the amalgamation of the said two former Companies on 29 September, 1708. This United Company later became known as the East-India Company.²

In exercise of its power the London East-India Company had taken up as early as 1668 the judicial administration of the islands of Bombay whose sovereignty also was vested in the British King by its transfer in 1661 by the King of Portugal.³ The laws established there by the Company were fairly exhaustive and administered by a hierarchy of Courts with distinct jurisdictions, though not always with a duly qualified judicial personnel.

In Madras, again, the Mayor's Court consisting of the Mayor and Aldermen and other officers had been functioning satisfactorily for a long time when the settlement at Fort William in Bengal could be declared a Presidency in December, 1699.

¹ The Charter of 31 December 1600

² 3 and 4 William 4, cap. 85, sec. cxi ³ The Charter of 27 March, 1669

The Court of Directors in London proposed as early as 1693 to set up for the settlement at Fort William a regular court of judicature like the one that was at the time functioning at Fort Saint George.⁴ But the English as yet failing to obtain a firm footing in Bengal because of the Nawab's refusal to grant them a permanent right of settlement under the revenue law of the Mughals,⁵ it was accordingly decided to await the proper time and proposed that offenders, when necessary, would be sent to Fort Saint George for trial.⁶

The acquisition in 1698 of the three villages of Sutanati, Govindpur and Calcutta placed the Company in the position of a Zamindar paying revenue to the Emperor. It was estimated that the said three villages contained, at the beginning of the eighteenth century, a population of well over 30,000. The Company at this time had thus two distinct authorities, namely, one of a Zamindar concerned with the collection of revenue and the exercise of some amount of magisterial functions of settling petty offences and revenue disputes occurring in the area under its control and secondly, of a corporate body exercising some amount of sovereign authority derived from the King of England, through the medium of Charters, over His Majesty's subjects residing at the various settlements in India.

In obedience to necessity, the Company, therefore, had to establish three types of courts with different jurisdictions.

First, there was the foudary court presided over by a member of the Board of Council or a servant of the Company under Council. The Court proceeded in a summary way, obtaining in case of capital sentences the approbation of the President and Council before execution.⁷ Its jurisdiction extended only to complaints of a criminal nature lodged by the Indian inhabitants.

Secondly, the court of chuchery was established consisting of the Company's servants under Council, any three of whom, their President being one, upon fixed days, met for adjudication, in a

⁴ The Letter of the Court of Directors, 10 April, 1693; Court's Letter Book, vol. ix, p. 257

⁵ Bengal Letter to the Court of Directors, 14 December, 1694

⁶ Court of Directors' Letter to Bengal, 14 May, 1696; see also Harington: *Analysis*, Vol. I, Calcutta, 1805 and 1809, p. (2)

⁷ William Bolt: *Considerations on Indian Affairs*, 2nd edn., London, 1771, Vol. I, p. 81

summary way, of small causes of action arising between the local people of the Company's settlement.⁸ More important and difficult causes of action had to be referred by this court of cuchery to the Council for their hearing before a full Council.⁹ Appeals from this court of cuchery lay to the Governor and Council.

Thirdly, there was another court called the Collector's Cuchery exercising its jurisdiction in the affairs and causes involved in the collection of ground rents.

The Company next decided to establish among other things a Mayor's Court at Calcutta. On an application to the King in Parliament the Company obtained a Royal Charter in 1723 empowering the Company to manage with greater authority the administration of its settlements in India. Under this Charter the Company proposed to introduce many innovations in the administration of justice at Fort William in Bengal.

One Charter more was granted for this purpose on 24th September, 1726. According to this Charter, an Annual Sheriff and nine nominated persons were to make the Court of Mayor and Aldermen to try all civil causes. It was to be a court of record. From the decisions of this Mayor's Court appeal lay to the President and Council and then, under certain conditions, to His Majesty's Privy Council in case the sentence was for one thousand pagodas, a pagoda being equivalent to three rupees. Three of the judicial members of the Mayor's Court, the Mayor or senior Alderman being one, were regarded as the quorum for the hearing, trying and determining all civil causes. It was nevertheless enjoined on the court to persuade as many members as possible to sit as judges so that justice might be done more scrupulously and with greater care and more serious deliberation.¹⁰

It seems that under the earlier Charter of 1726, the Aldermen elected their own mayor instead of two members as their nominees, as under the second Charter of 1753, for the choice of the Hon'ble the President and Council at Fort William.¹¹

⁸ The Parliamentary Committee of Secrecy, 1773, quoted Firmininger; *Introduction to Bengal Portion*, p. lxx, Fifth Report, 1812

⁹ Consultations of Council, August 18, 1704

¹⁰ *Court of Directors' Letter to Bengal*, 17 Feb. 1726-27

¹¹ Proceedings of the Mayor's Court, 20 December, 1748; Proceedings, 2 December, 1755

The period of mayoralty being over, the President (mayor) would sit on the Bench as an ordinary alderman judge of the court.¹² When vacancies arose, the Court elected its aldermen.¹³ The aldermen when to resign did it with the leave of the court. The Mayor being indisposed or absent the seniormost alderman would take the chair. A full court would be summoned for the election by ballots of two members, under the Charter of 1753, to be presented to the Governor and Council at Fort William for them to elect one of them to serve as Mayor of the Corporation for the ensuing year.¹⁴ A full court would be again summoned to attend the President and Council with the Mayor Elect, to see him sworn in office.¹⁵ The judges were very keen about their work; the court went on doing its daily job as usual and did not 'rise' earlier, even on the day of the swearing in ceremony of the Mayor.¹⁶

The President and Council were the authority to appoint the Sheriff and the Registrar of the Mayor's Court. They could likewise appoint the Accountant-General of the Court. All these incumbents were liable to removal by the said authorities.

The aldermen of the Mayor's Court, though formally elected by the court and confirmed by the said President and Council and also liable for dismissal by the said authorities enjoyed a much privileged position. They could move not only the Hon'ble the Court of Directors but also His Majesty in Privy Council for their restoration.¹⁷

Unless a full court was summoned it was optional for the judges to attend the bench. Thus, the proceedings of the court covering, say, a fortnight, show that the number of aldermen attending the Court could vary from 2 to 9, the minimum and the maximum possible.

The court did not sit for more than half of the days of the week. The volume of work it discharged, however, seems to have been formidable. Up to the last days of its life the court was much more hardworked than many of the courts of law of to-day.

¹² Proceedings, 22 December, 1748 ¹³ Proceedings, 9 May, 1749

¹⁴ Proceedings, 28 November, 1755, and 2 December, 1755

¹⁵ Proceedings, 20 December, 1755 ¹⁶ Proceedings, 2 December, 1755

¹⁷ The Letter of the Court of Directors *per* "Dolphin" 27 June, 1770 to the President and Council at Fort William; Proceedings, 3 April, 1771

The court was mainly occupied in causes of will, probate, administration, contract, and debt. Towards the close of the life of the Mayor's Court the Indian section of the inhabitants of the settlement at Fort William did not form the major portion of the litigants as in the other periods of its life.

The court used to dispose of the causes as quickly as possible. Only in exceptional cases they were protracted over a long period.¹⁸ The proceedings of the Mayor's Court show how anxious it was over this delay.¹⁹

The court desired the attendance of a larger number of judges when important or complex cases involving the interpretation of law had to be decided. The East-India Company's cases, which were few in number, seem to have been considered as falling under this category.²⁰ The court however did not attach any undue importance to the Hon'ble the East-India Company as a party. The value of the monetary suits, however large, was not considered a mark of importance. Thus on the 8th March, 1771, when a very large number of such suits came to be considered and debated, six of which involved the sums of Rs. 80,432-12-6, Rs. 69,416-1-4, Rs. 183,800-10-6, Rs. 160, 775-13-6, Rs. 155,688-5-6 and Rs. 58,643-6-9 respectively, only the minimum number of personnel, that is, the Mayor and two Aldermen constituted the bench.

The Mayor's Court by the traditions made it compulsory for the Indian people to engage attorneys for the conduct of their business in the court. The Hon'ble the Mayor's Court did not take the cognisance of causes between Indian natives unless represented by attorneys; failure on the part of the defendant to engage an attorney would render him liable for the contempt of the court. The introduction of attorneys was however not encouraged by the authorities in England. The Directors thought that the services of too many elements might lead to the prolongation of suits with the result that "justice might be rendered sour by delaying."²¹ The institution of attorneys, as we have seen, could not be dispensed with. The Mayor's

¹⁸ Proceedings, 14 July, 1749

¹⁹ Proceedings, 12 May and 13 May, 1749

²⁰ Proceedings, 8 February and 17 December, 1771

²¹ Para. 15, *The Court of Directors' Letter to Bengal*, 17 February, 1726-27

Court however kept a strict vigilance over the conduct of the attorneys practising at the court. They could not resign or absent themselves from the court for a considerable period of time without the leave of absence granted for the purpose. The vacancies, when any, were filled up with care.²² It being obligatory for the parties to appear by attorneys, the court would engage attorneys for the persons who pleaded poverty having no wherewithal or alleged that they were not worth Rs. 40/²³ Parties were also allowed to defend cases as paupers, and in proper cases would get diet money in jails either at the cost of the Government or of the complainants.

Commissions were issued to respectable officers of the Company to examine witnesses and to take depositions at their places of business, instead of calling them before the court which was situated at so great a distance from the different parts of the country. The precepts and commission of the Hon'ble the Mayor's Court had to be executed by the Company's officers with a great dispatch.²⁴

The judges are not found to have referred to English law and usage in determining the causes coming before them though English rules and procedure, in a simplified form, were in vogue in the court.

The court in some cases tried to evolve a procedure of its own after a due deliberation over the subject, and sometimes refused to reflect upon the principle to follow. Thus on the 19th July, 1749, a full court was summoned consisting of the Mayor and aldermen, to consider of Mr. Holland Goddard's paper delivered into the court, moving it to take into consideration a number of queries without a "speedy, clear and perfect solution" of which justice could not be properly administered in a particular cause.²⁵ The mover judge observed that a definite procedure was to be evolved and followed, and the court was to devise and follow a sense of propriety in time, matters, things, persons and

²² Proceedings, 14 May, 1771

²³ Proceedings, 9 July, 1748-49

²⁴ The Letter of the President and Council at Fort William, 22 July, 1771, to the Registrar of the Mayor's Court

²⁵ Proceedings, 19 July, 1749: Edward Holden Cruttenden and John Zephania Holwell — complainants and Nyān Mulleeck — Defendant and the cross-suit

forms necessary to support a decorum in the court. The court, however, instead of furnishing categorical answers was unanimously of opinion that Mr. Goddard should be referred to the Charter and Instructions and to his own judgment for the solution of his own queries. Mr. Goddard was disappointed.²⁶

The court took notice that frequently when the effects of the natives were seized or sequestered by virtue of either warrants of sequestration or execution, the relatives of the said natives claimed the effects both movable and immovable under various titles. The court therefore ordered its registrar to collect the best information he could from the principal 'black' merchants of the town, relating the right and title of the widows and children and relatives of the natives who died intestate. The registrar was ordered to commit the said information in writing and enter the same in a book to be kept for that purpose in order to better enable the court to form its judgment where any claims of the natives were presented to it for their determination.²⁷

The court, where justified, would reconsider its orders made on its previous sittings, and upon hearing what were alleged by the attorneys on both sides and other interested persons would confirm or reverse its previous orders. The question of the court's competence in the matter arose in the case of *George Vansittart William & Ors. against Govindchund Seal*, and the question was put whether the order of the court made in the said cause on the 19th February, 1771, should be confirmed or reversed. The court, referring to the Act made in the 29th year of the reign of King Charles II, produced by the attorney of a person interested, was unanimously of opinion that the said order made on the 19th February, 1771, should be reversed. The parties were in this way allowed to reopen their cases for further arguments, and the court when satisfied would reverse its former orders.²⁸

The aldermen were sometimes parties, attorneys, or executors. As there was no second court with competent and co-extensive jurisdiction with the Mayor's Court, the aldermen had of necessity to approach the Mayor's Court for the necessary determination of their own causes. Such aldermen, however, having con-

²⁶ Proceedings, 20 July, 1749 ²⁷ Proceedings, 15 February, 1771

²⁸ Proceedings, 30 August, 1749, and 3 April, 1771

ceived themselves in some degree a party, would not preside over the court, though eligible by virtue of seniority.²⁹ The next alderman in seniority would hold the chair for a particular business while the senior alderman acted as the attorney. After the particular business was over, he would resume the chair and hold the court.³⁰ When the aldermen happened to be parties, they did not generally sit as judges at the time when their own causes came to be heard and determined. The mere mention of the causes in the day's agenda did not however always dissuade the aldermen from sitting as judges.³¹ Mr. Holwell, one of the plaintiffs and an alderman, did not generally sit as a member of the court when his own case was being heard. Both before and after the dates fixed for his cause he joined the court as a judge. Mr. Holland Goddard, on the other hand, does not seem to have followed the same principle.

Arbitration was resorted to at the instance of the court. Arbitrators were asked to abide by the directions of the court and any deviation on their part would not be tolerated unless duly accounted for. Sometimes the parties themselves informed the court that they had left their dispute to arbitration and the award would be delivered into the court within a reasonable time.

It was recorded on 19 June, 1749, as the unanimous opinion of the Mayor's Court that the appeal from its decisions must be lodged in 14 days from reading the decree in the fair Court Book. The court, however, could as a matter of discretion extend the time for appeal. On 15 January, 1771, for example, Mr. Morris, attorney for one Meer Ashraff, prayed for a month's time to write to his client residing at Patna to know whether he would appeal his cause. One month's time was allowed by the court. Appeals from the decisions of the Mayor's Court and from those of the President and Council at Fort William in appeal from the said Mayor's Court were few in number. But when any, they were given as much consideration by His Majesty's Justices as the appeals to the Privy Council received till 12 October, 1949, when its jurisdiction over India was abolished under the law of the Indian Parliament.

²⁹ Proceedings, 16 December, 1753 ³⁰ Proceedings, 19 December, 1755
³¹ David Clayton against Thomas Debuque

The decrees of their Excellencies the Lords Justices of His Majesty in the causes in appeal from the Mayor's Court or the President and Council at Fort William were made decrees of the courts here.³²

The decree of their Excellencies the Lords Justices of His Majesty in the cause of *Thomas Bradytt and others—appellants — and Hemphreys Gole Esq. — respondent* — dated "At the Court at St. James's the 16th day of March, 1748" and also the decree in the cause between *John Rennald, Plaintiff and by Bill of Revivor of Mr. Alex. Rennald — Plaintiff and William Barwell— Esq., Defendant* dated, "At the Council Chamber Whitehall the 23rd day of June, 1748", among other decrees, will show the amount of importance that was attached in England to the causes going in appeal from the decisions of the courts here in India.

The petitions and appeals from the East-Indies were at first heard by the Rt. Hon'ble the Lords of the Committee of Council for hearing appeals from the plantations, and the reports of the said Committee of the Privy Council were read at the Board consisting of His Most Excellent Majesty and their Excellencies the Lords Justices including the Lord Chief Justice. In both the courts the counsel of the parties were heard.

The judges of the Mayor's Court, when dissenting, could get their dissent recorded, but not their reasons of dissent at large, at the margin of the official register.³³

The Mayor's Court was anxious to maintain its traditions of unsullied reputation. Allegations levelled against it of partiality and corruption before the Board of Council or the Court of Directors, and reflections on its conduct by the parties or aldermen themselves were duly inquired into and conclusions reached. The contemnors had to satisfy the court as now.³⁴

The Mayor's Court at Calcutta had to work in co-operation with the courts of England and the other courts obtaining in the settlement of Fort William. The principle of *lis pendens* was followed, and any violation of the principle was considered

³² Proceedings, 30 May, 1749

³³ Proceedings, 26 April, and 2 May, 1749

³⁴ Proceedings, December 10, 1755; Charles Lodwick's letters to the Mayor's Court, 26 Feb. 1748-49, and 27 Feb. 1748-49

as a contempt of court.³⁵ Sometimes it received requests from the High Prerogative Court of Canterbury to execute its commission of administering oath to the persons living at the settlement at Fort William in order to enable the Court of Canterbury to administer justice in the premises in England. The Court of Canterbury assured the Mayor's Court of a like service in return if at any time required.³⁶

The records of the Mayor's Court functioning under the renewed Charter of 1753 show that the court held its sittings in the last part of its life in the Town Hall of Calcutta.

The Mayor's Court, founded at Calcutta in 1727 and re-chartered in 1753, functioned for about 50 years. The defects of its working were many. The judicial personnel of the court were selected from the Company's own junior servants who were of tender age and without much education.³⁷ Sometimes legal opinions had been sought from the counsel in England, and proceedings in the Mayor's Court had to be suspended pending their arrival. Appeals to the King in Council from the decisions of the Mayor's Court were expensive.

The Mayor's Court judges though constituting a court of record, only disposed of litigation and did not seek to formulate rules, whether substantive or procedural. They in their decisions, so far as the records are extant in the High Court at Calcutta, did not, as we have seen, attempt to state any general principles of law as derivable from their determinations of particular disputes. They only "heard, supervised and determined particular concrete contentions." To use an expression of judge Jerome Frank, the Court in deciding cases was engaged in a sort of retail, not a wholesale job.³⁸ Apart from the limited equipment of the Mayor's Court judges, the formulation of broader legal principles had not been found indispensable in the judicial administration by the court. The continental countries of Europe have been till date more concerned with the justice of the individual cases than with the formulation of legal principles.³⁹

³⁵ Proceedings, 17 February, 1748.49

³⁶ Proceedings, 5 December, 1755, and 22 January, 1771

³⁷ The Seventh Report of the Committee of Secrecy, 1773, cited, William H. Morey; *Analytical Digest*, 1850, Vol. I, p. xii

³⁸ *Courts on Trial*, p. 11

³⁹ W. Friedmann; *Legal Theory*, 1947, p. 301

The servants of the Company as factors settled in the various places of the provinces of Bengal, Bihar and Orissa, carrying on trade in their own behalf as well, often took law in their own hands inside Calcutta as well as outside. Forcible seizure of the debtors' body in his refusal or inability to pay the English creditor was one of the usual modes of realisation of dues adopted by the English settlers at the earlier time of the British rule in Bengal. The cases were not always referred to the Mayor's Court at Calcutta or to the Nawab's courts outside Fort William. This state of things has been admitted as to have existed by the Sixth Report of the Committee of Secrecy, 1773.

As a counterpart of the Mayor's Court which was a civil causes court, the President and five of the senior Councillors at Fort William were empowered and directed to work as Justices of the Peace and Commissioners of Oyer, Terminer and Gaol Delivery, holding quarter sessions, and hearing, trying, determining and punishing in all criminal causes, except only high treason, as Commissioners of Oyer and Terminer and Gaol Delivery did in England at that time, appointing and summoning grand and petty juries for those purposes. The new Charter of George II, dated 8 January, 1753, extended the said privileges of the five senior Councillors, to all the members of the Council. The President and Council at Fort William were made a court of record. For the guidance of the courts established by the Royal Charter of 1726 detailed instructions were sent to Fort William. They were specially prepared by experts at the instance of the Court of Directors in London and were entitled "Instructions for putting in Execution the East India Company's Charter."⁴⁰

The British rule at Fort William caused and accelerated the introduction of English law and procedure in the Sessions Court there. The English law which at the time recognised more than one hundred and sixty felonies was thus to govern the Indian people settled or employed at the Company's settlement. Consequently, crimes were punished with penalties more severe than Mahomedan law would sanction.⁴¹

⁴⁰ Para. 11 of the Court of Directors' Letter to Bengal, 17 February, 1748-49

⁴¹ Firminger; *Fifth Report*, Introduction, Calcutta, 1917, Vol. I, pp. xci-iii

It will be interesting to recall that the functions of the Grand Jury of those days were not as much specific as those of the jurors of to-day. The jurors of to day are concerned almost solely with the establishment of facts, but their predecessors had also to examine the Bills of Complaint and to return them as true or not true. They were, again, to be unanimous in their verdict. They were also concerned with social and economic problems affecting the people. Thus the Grand Jury consisting of 12 persons including Petre Amyall, Foreman, laid before the Worshipful Sessions Bench on 31st May, 1755, the presentments touching the Dearthness and Scarcity of Provisions and other Necessaries of Life. The presentments said that this was the sixth time in the discharge of their duty as grand jurors that they humbly remonstrated that no proper measure had yet been taken for the redress of those grievances. They further stated that "the cries of the poor and the needy came hourly to their ears and grew daily louder and louder". They earnestly recommended that the presentment of the Grand Jury touching these matters and delivered into the sessions court on 22nd day of November, 1750, might be taken into consideration by the Worshipful Bench and measures as recommended by the said presentment effected.

The court, in its turn, assured the Grand Jury that the Government would take proper measures relating to the presentments and endeavour to find out convenient measures for the redress of the grievances.

The said Presentments of the Grand Jury were given a serious consideration. An extraordinary meeting of His Majesty's Justices was held in the Consultation Room of Fort William on the 15th August, 1755, conformable to the Rules prescribed in His Majesty's Charter. In the said meeting were present the Hon'ble Roger Drake, Esqr., President, and seven other Worshipful Justices. His Majesty's Justices of the Peace for the Town of Calcutta in the kingdom of Bengall Presidency took into consideration the Grand Jury's presentment dated the 18th May, 1755, referring them to a presentment made by the Grand Jury on the 22nd November, 1750. Their worshipful honours however came to the conclusion that the Gentlemen of the Grand Jury were wrong in their analysis of the dearthness of price of food

grains, utensils and firewood. The price of food and utensils increased because of the increasing population at the settlement. The increase in building necessitating consumption of firewood for burning bricks increased the price of firewood. The measures suggested by the Gentlemen of the Grand Jury were considered ineffective. The Gentlemen of the Grand Jury were, on the contrary, advised to curtail the superfluities at their tables instead. If the Government could remedy the situation, it was observed, the necessity for a second presentment would not arise. The reflections upon the Administration were taken exception to.

The Gentlemen of the Grand Jury, in their turn, would not let the matter go. On the 20th August, 1755, they came into court and delivered an address to the court expressing their regret at the inconveniences because of the scarcity and high prices and also for the reflections of the Justices regarding superfluities on the jurors' tables. The English Zamindar had both executive and legislative powers, perhaps wider than those of the King of England, they added, and the Justices, therefore, should have found redress.

The Sessions Court, again, sent presentments to the Grand Jury for the redress of public grievances. The following is a presentment sent to the Grand Jury on the 17th February, 1755, illustrating a public grievance :

"The Jurors for our Sovereign King... present that Omichund of this place inhabitant, having been frequently presented to the Court by several Grand Jurys as will appear by the words for neglecting to repair the houses so great so great in number in this Town which he is possessed of several of which are quite untentable as by Mr. William Walls report some of them, dated 17th August, 1754 will more fully appear and the said Omichund being directed by the Bench of Justices to repair those houses agreeable to the said Report which to the Jurors appears he has not complied with the Houses of his remaining still in a ruinous and untentable consideration the Jurors therefore do say that the aforesaid neglect is a great nuisance to the Town in Gent and to the inhabitants thereof as well as a high contempt to the orders of Court and therefore the Jurors do present the aforesaid

Omichund for wilfully neglecting to put his said houses in Repair agreeable to the order of the Bench of Justices by which means the said Nuisance still remains to the Hazard of the Lives of many inhabitants who are obliged to rent the said Houses for want of others as likewise passengers passing by and Endangering neighbouring Houses by their fall.

Dated in Calcutta 17th February, 1755."

The Grand Jury returned into court and delivered in the above presentment endorsed as a true bill. A Bench of Justices was to be called to give effect to the said presentment.

The Grand Jury for King and for the Body of the Town of Calcutta presented on another occasion that the hole dug by one Francis Reade be filled up because it would harm the houses of many Englishmen. The Company's Surveyor was ordered to go to the spot and investigate the matter. The subject of water drains was thus also enquired into and presentment submitted by the Grand Jury requesting the court to pass necessary orders.⁴²

"The Proceedings of His Majesty's Justices in and out of Sessions for the year 1755: Town of Calcutta Sessions: At a General Quarter Sessions of the Peace Sessions of Oyer and Terminer and Sessions Gaol Delivery 'holden' for this Town and precincts on Monday of the 17th day of February in the 28th year of the Reign of our Sovereign Lord King George Anno Dom. 1755" show that the Chairman and other Justices or the Chairman alone constituted the Sessions Court. The sheriff was called upon to deliver the record for summoning the Grand and Petit Juries to attend the Sessions. The records show that unlike the aldermen of the Mayor's Court the Justices of the Sessions Court each had a distinguished career as administrators. The jurors, too, had been men of character and efficiency. On the 17th February, 1755, Mr. Solom. Margass, Foreman and 16 jurors constituted the Grand Jury for the Sessions. Harry Verelst was one of the jurors. It will be an interesting study to print herein a Bill of Indictment made use of in the Sessions Court of those days.

To the Grand Jury was sent a Bill of Indictment against

⁴² Proceedings, 18 November, 1755

Domingo De Rozario for the murder of one Nowagee. The Grand Jury returned into court and delivered the above indictment endorsed as a true bill. Domingo De Rozario was accordingly sent to the Bar and arraigned of the following indictment:

"The Jury of our Sovereign Lord the King upon their oath do present that Domingo De Rozario Labourer of the town of Calcutta aforesaid not having the fear of God before his Eyes but being moved and seduced by the Instigation of the Devil on the 2nd day of January — in 1755 — by force and arms and within the town of Calcutta aforesaid in and upon one Nowagee in the peace of God and of our Lord the King then and there being feloniously voluntarily and of his malice aforethought the said Nowagee kill and murder against the peace of our Sovereign Lord the King, his Crown and Dignity".

To the said indictment, Domingo De Rozario pleaded not guilty, and as he was a foreigner he demanded the privilege of a 'mixt' jury which was accordingly granted by the court.

The indictment was again read to the jury and charge given. Evidence was called. The Petit Jury returned a verdict of not guilty. The accused was 'cleared' by proclamation. Similarly, one Domingo De Costa, a Portuguese, charged for assaulting one William Cocker, demanded a mixed jury and was granted one on 31st May, 1755.

The court was, by an injunction from the Mughal in whose dominion the town of Calcutta stood, prohibited to put to death by the English laws any of the natural born subjects. The court thought that it could not bring such subjects within the cognisance of the English court without 'risque' of embroiling the Hon'ble the East-India Company's affairs in those kingdoms.⁴³ The position of the Company on this point has been with consistency delineated also in the manuscript referred to in Section I. The position however changed after the elevation of the Company. The Quarter Session in Calcutta in the post-Plassey days tried criminal cases according to the law of England. According to the account prepared by R. Hudson, Pro. Examiner

⁴³ Town of Calcutta Sessions, Proceedings, 20 August, 1755

of India Correspondence, East India House, dated 3 March, 1788, during the period 1 January, 1762, to 1 September, 1774, the Sessions Court at Calcutta tried 45 cases involving 62 accused, the majority of whom was the people of this country. In 21 of these 45 cases, the sentence was capital. In all, 38 Indians seem to have been involved in these cases of whom 21 received death punishment. Even forgery was punishable with death. The English law of the time which recognised not less than one hundred and sixty felonies governed for a time the citizens at Fort William.⁴⁴ The Company's Collectors, in their replies to the inquiries addressed to them in 1790, expressed the idea that it was impracticable to leave the Indian law substantially unaltered if the British government in India had to be firmly established.⁴⁵

In point of time, reference may be made to the Court of Requests and the Court of Small Causes at Calcutta.

Under the new Charter obtained by the Company in 1753 for Bengal, along with those for Bombay and Madras, Commissioners were established to serve as a Court of Requests for the recovery of debts not exceeding five pagodas in amount. The court's jurisdiction was later on extended up to 80 rupees.⁴⁶ Under an enabling statute of Parliament⁴⁷ a Proclamation was published by the Governor-General and Council of Fort William on 18 March, 1802, declaring and defining the jurisdiction, powers and practice of the court. This Proclamation appointed three Commissioners for the recovery of small debts and raised the jurisdiction of the court to 100 sicca rupees. By another Proclamation the jurisdiction was raised to 250 sicca rupees. Yet another Proclamation dated 29 October, 1819, enhanced the jurisdiction as not exceeding 400 sicca rupees and appointed a fourth Commissioner.

The Court of Requests was then authorised by the Governor-General in Council, in certain cases, to execute decrees passed by the judge of the diwani adawlut of the Zillah 24 Pargun-

⁴⁴ Verelst : *View of the Rise, Progress and Present State of the English Government in Bengal*, 1773, pp. 26, 134, 141; Firminger: *Introduction to the Fifth Report*, 1812, xci

⁴⁵ Firminger's *Introduction*, lxxxiii ⁴⁶ Section 30 of 37 Geo. III, c. 142

⁴⁷ Section 17 of 39 and 40 Geo. III, c. 79

nahs.⁴⁸ In 1848, the powers of the Commissioners of the Court were precisely defined.⁴⁹ This court was subject to the order and control of the Supreme Court at Calcutta. In 1850, the Court of Small Causes was established in lieu of the Court of Requests.⁵⁰

⁴⁸ Act XXVII of 1839

⁴⁹ Act XII of 1848

⁵⁰ Act IX of 1850

III

THE SUDDER DEWANNY ADAWLUT

IN APRIL, 1758, the English got the assignment of revenue in the districts of the Rajah of Burdwan and Nuddiah. In March, 1761, a revenue official was established at Burdwan. The Resident there in addition to his duties regarding the collection of revenues had had the duty of supervising the administration of justice in the Division under his control.

In December, 1760, Chittagong having been ceded to the Company by Nawab Mir Kasim¹ the Council at Fort William appointed Harry Verelst to be Chief of Chittagong with the power of superintendence of the foudary jurisdiction. The Foujdar at Chittagong after pronouncing judgments submitted them to the Naib Nazim for confirmation. The orders when confirmed would come back to the Chief of the Division for their execution. The cases involving punishment of mutilation or impalement were reserved for the time being pending execution, the Resident submitting them to the authorities at Fort William for their confirmation.

Similarly, Johnstone was sent to Midnapur as the Resident there with the same power of supervision over the administration of criminal justice in Midnapur as was being exercised by the Resident at Chittagong. By the year 1771 all the judicatures in Midnapur were functioning under the authority of the Resident. All cases of disturbances were duly reported to him and every case was duly registered in the Foujdar's Cuchery so that there could be no arbitrary fines or imprisonment independent of the Resident's approval.

The three districts of Burdwan, Chittagong and Midnapur ceded by Mir Kasim and Mirjafar and confirmed by Emperor Shah Alam remained for a time a separate entity as distinguished from the dewanny lands of Bengal, Bihar and Orissa. The bestowal of the dewanny of the latter lands on the East-India

¹ Mir Kasim was made Nazim on 27 October, 1760

Company on 12th August, 1765, deprived the Nawab of all virtual military power and placed the Company in the position of the king of the said territories of Bengal, Bihar and Orissa.² The civil administration including the administration of justice was however in the beginning desired to be left in the hand of the Nawab or his Ministers, and the Directors wished to avoid interfering in the functions of the Nazim.³ But the power at Delhi having waned, Bengal, Bihar and Orissa could not accommodate two distinct authorities with divided power. One must dominate the other, and this was to be settled in favour of the English.⁴ Warren Hastings became Governor and President of Fort William on April 13, 1772, and began to effect alterations in the administration of the three Provinces. He frequently exercised the power of correction, alteration and commutation of the Nazim's Court decisions.⁵ The Nazim or his minister had no independent way of action and the Company was in effect the only political power in the three Provinces.⁶ This relation between the Company and the Nawab had been known to all.⁷ Hastings, in accordance with the instructions of the Court of Directors, repudiated in 1774 the obligation of making to the Emperor at Delhi the annual payment of 26 lakhs of rupees, which according to Lord Clive's agreement with Shah Alam, was due to the Emperor as his share of revenue.⁸

The Supreme Court of Judicature at Fort William in Bengal, too, reviewed the position as the Court saw it. Thus while the controversy over the Nawab's sovereignty was going on in the Council, the Supreme Court, after due deliberations on the specific question raised by Councillors John Clavering, George Monson, and Philip Francis in their letter dated, Revenue Department, Fort William, 20 June, 1775, unequivocally decided

² Consultations of the Select Committee, 10 September, 1766

³ Court of Directors' Letter to Bengal, 17 May, 1766

⁴ General Letter from Bengal to the Court of Directors, 30 September, 1765

⁵ Hastings's Minutes; Proceedings of Council, 3 August, 1773

⁶ Minute of Clavering, Monson and Francis; Consultations, 18 October, 1775

⁷ Minute of Warren Hastings; Consultations, 7 December, 1775

⁸ General Letter to Bengal from the Court of Directors, November 11, 1768

in two cases⁹ in 1775 that the Nawab of Moorshedabad could not be considered as the sovereign authority in Bengal, Bihar and Orissa. The said three Councillors again on July 31, 1775, wrote to the Judges of the Supreme Court, including the Chief Justice Sir Elijah Impey, wanting to know the real position of the Nawab as regards his sovereignty, and received the same opinion of the Judges as in the said two earlier cases of Joseph Fowke, Francis Fowke, Maharajah Nanda Kumar and Radha Charan Roy.

With this realisation of the transfer of the *de facto* sovereignty from the Nawab and the Emperor to the Company, they had earlier begun to interfere in the administration of the Provinces of Bengal, Bihar and Orissa. One Supervisor was, earlier, appointed for Purnea. The appointment having proved itself useful, the institution was preferred to be extended to the other districts of the dewanny lands. Verelst's plan of appointing 'Supravisors' for each district was adopted by the Select Committee at Fort William on August 16, 1769. These Supervisors were appointed in 1769 from among the Company's covenanted servants. They were to report, among other things, on the administration of justice in the districts with a view to its ultimate reform and to supervise the work of the Indian officers engaged in the collection of revenues and administration of justice. They were instructed to check any undesirable compromise of criminal causes and to prevent in the administration of criminal justice in the Mahomedan courts of law where the decisions looked arbitrary in that trifling offences were visited with heavy fines and capital offences were let off without any punishment. They were strictly enjoined to enforce justice as required by law. In case of civil disputes, methods of arbitration were recommended; the arbitrators, selected by the parties themselves, had to be men of character and immune to bribery and corruption. The persons administering justice in the various places of the district had to produce their *sanads* or other authorities empowering them to act in that behalf. The persons without any such enab-

⁹ Case of Joseph Fowke, Francis Fowke, Maharaja Nuncomar and Roy Radha Churn for a conspiracy against Warren Hastings, Esq., and the case of Joseph Fowke, Maharaja Nuncomar, and Roy Radha Churn for a conspiracy against Richard Barwell

ling authority would be debarred from exercising judicial functions. The Indian administrators of justice, that is, the Brahmins and the Kazis, had henceforth to be registered. The records of the adjudications in the interior courts had to be kept at the sudder cuchery at the headquarters of the district and a monthly return thereof to be transmitted to Moorshedabad. The Supervisors had further to see that the sentences in capital crimes were reported to the Resident at the Durbar at Moorshedabad, to be referred by him to the ministers of the Nawab for their confirmation or mitigation as required by the law and circumstances of the case. The determination of castes had to be left to the Brahmin judges of the localities but the Supervisor had to watch that no partiality or discrimination was shown there. In case of a clear forfeiture of caste by a person, it was directed that he might not be restored to it without the sanction of the Government. The Supervisors were required to be accessible, personally hearing and determining cases, when necessary, aiming at no undue personal influence and checking it in all others. To use Verelst's own expressions, integrity, disinterestedness, assiduity, and watchfulness were binding on all of them not only for the personal guidance, but also as an example to all others. It was asserted, again, that activity and advice would not go far unless confirmed by personal examples.¹⁰ The achievement of these Supervisors was however not up to the mark and they were gradually transferred to other work and later termed 'Collectors'.

The catastrophic famine of 1770 causing the destruction of at least one-third of the inhabitants of the Province of Bengal induced the Court of Directors to take up themselves the duty of administering the three Provinces through their own servants and without the aid of an Indian Naib Dewan.¹¹ It was accordingly declared on May 11, 1772, that the Indian Naib Dewan was removed from his office. His charge was assumed and duties performed by the Chief and Council of Revenue at Moorshedabad. This Chief and Council of Revenue were also entrusted to settle complaints not admitting of capital punishment. The Nawab, too, was a minor. Thus with the union of the Nazim's and the Dewan's powers in the same hands, Warren Hastings was enabled

¹⁰ Verelst's *View*, etc., Appendix p. 134

¹¹ The Court of Directors' Letter to Bengal, August 28, 1771

to plan for a reformation of the general administration of the country including the administration of justice. On May 14, 1772, a number of important decisions were made by the Governor and Council at Fort William. A Committee of Circuit consisting of the Governor and four members of the Council, was to be appointed to visit the principal districts and form the five years' settlements. This Committee of Circuit, while at Moorshedabad drew up *A Plan for the Administration of Justice*. The letter from the Committee of Circuit to the Council at Fort William dated Cossimbuzar, 15th August, 1772, accompanying the said plan for the administration of justice said that in forming the plan the authors had confined themselves with a scrupulous exactness to the constitutional terms of judicature already established in the Province of Bengal. The changes, where introduced, aimed at recurring to the original principles with their intrinsic efficiency and would thus secure to the people general ease and satisfaction.¹² The Committee of Circuit found it expedient to allot the charge of supervision of the administration of criminal justice to the Nazim and that of the administration of civil justice to the English Dewan. These two branches of the administration of justice were kept distinct and separate. As many as 37 Regulations were drafted by the Committee of Circuit on August 15, 1772, while staying at Cossimbuzar. They were adopted by the President and Council at Fort William on August 21, 1772.¹³

The Regulations of August, 1772, sought to work many changes in the administration of the three Provinces of Bengal, Bihar and Orissa. The judicial administration of the Provinces was also affected. It was proposed that for each district two courts should be established:

1. The Mofussal or Provincial Dewanny Adawlut was to be established exercising jurisdiction over all disputes concerning property, causes of inheritance, succession, marriage and caste, claims of debt, disputed accounts, contracts, partnerships, and demands of revenue. The Company's Collector was to preside

¹² *Proceedings of the Governor and Council at Fort William respecting the Administration of Justice amongst the Natives in Bengal*, London, 1775, p. 2

¹³ Records, National Library, Calcutta

over this court assisted by the Indian Dewan of the district and the staff of the court in question. Claims to zamindaris were left as the jurisdiction of the President and Council at Fort William.

2. The Mofussal or Provincial Foujdary Adawlut was to be established exercising jurisdiction over all cases of criminal acts. Here the Kazi or Moofiti of the district and two moulavies would be expounding the Mahomedan criminal law and determining the sentences. The Collector, again, had to attend to the proceedings of the court. He had to see whether the necessary witnesses and evidences were summoned and examined; whether due weight was attached to their testimony; and whether the decisions passed were fair and impartial. All the causes had to be decided in open courts regularly assembled. This court could award corporal punishment. It could also award the punishment of compulsory labour on the roads and other public utility services. In cases of capital punishment the awards had to await confirmation by the Nazim at Moorshedabad.

At the head seat of the Company's Government a member of Council had to do the function of the District Collector in each of the local Dewanny and Foujdary Adawluts. From July, 1773, selection of the personnel of the district Foujdary Adawluts was left to the choice of the Darogah of the Sudder Nizamut Adawlut, the Kazi-ul-Kujjat and the Chief Moofiti. Such nomination had, however, to be confirmed by the Governor-General.

These Regulations thus vested in the Company's agents the power of control and supervision of the administration of justice, both civil and criminal, in the districts of the dewanny lands. The right of the Nawab to confirm or alter the sentences inflicted by the criminal courts below was retained though impaired by the interference of the Company's agents acting as the highest executive of the Provinces. Heavy fines were abolished which had hitherto been authoritatively imposed on certain crimes. The commissions as yet authorised on payments of debts enforced by the courts were likewise abolished. The Kazis and the Mooftis would be henceforward paid by the Company as regular state servants on monthly salaries.

The Collector was empowered to frame additional subrules for the administration of justice. Such subrules had to be re-

ported to the Committee of Circuit to be further referred by the Committee to the Board of Council for their sanction and confirmation.¹⁴ These Sudder Adawluts were envisaged in Rule XXIV of the Hastings's Plan for the Administration of Justice.

Under the said Regulations of August, 1772, two superior courts were established at the head seat of the Government at Fort William.

The Sudder Dewanny Adawlut was opened¹⁵ on the 18th March, 1773, to hear appeal cases from the mofussal adawluts. The President with two members of the Council would constitute the court, assisted by the Dewan of the treasury, the head Canongo and other officers of the court. In case the President was absent, a third of the Council would sit. Thus three members would constitute the quorum, though the whole Council might sit as a court if they liked.¹⁶

The Governor and other members of his council during the period of 1772-74 and later on from 1774 the Governor-General and other members of his Council, constituted the Judges of the Sudder Dewanny Adawlut. The sittings of the Sudder Dewanny Adawlut were discontinued in 1774. It was on the 20th March, 1780, that the Governor-General and Council revived and recontinued the same. Because of the multiplicity of business of the Governor-General and councillors no court of the Sudder Dewanny Adawlut was held before Governor-General and Council or any member thereof for a number of years at a stretch. It was therefore resolved on 24 October, 1780, that the said court should be held before one Judge, who was to be nominated and appointed by the Governor-General and Council. These and other considerations made Hastings propose to appoint Sir Elijah Impey, Chief Justice of the Supreme Court of Judicature at Fort William in Bengal, the Judge also of the Sudder Dewanny Adawlut.¹⁷ The Judge of the Sudder Dewanny Adawlut, thus appointed, was to accept the charge and superintendence of

¹⁴ Rule 37 of August 21, 1772

¹⁵ Letter from the President and the Council in Bengal, for the Department of the Revenues, to the Court of Directors, dated 25 March, 1773, para. 12. According to some, the Court was opened on Wednesday the 17th March, 1773

¹⁶ Rule 1 of August 21, 1772

¹⁷ Hastings's Minutes in Council, 29 September, 1780

the said court subject to the Regulations of the Governor-General and Council governing the jurisdiction and procedure of the court in question. Against the opposition of other members of the Council, Hastings supported by Eyre Coote and with his own vote carried his proposal. The new Regulations embodying and effecting this change were enacted on November 3, 1780. In giving a number of reasons for transferring the jurisdiction of the Governor-General and Council to the Chief Justice of the Supreme Court as regards the office of the Sudder Dewanny Adawlut, Hastings stated that the Sudder Dewanny Adawlut was not only a court of appeal receiving under certain conditions appeals from the decrees of the courts below but by virtue of its inherent power its duty was to receive and revise all the proceedings of the inferior courts, to attend to their conduct, to remedy their defects, and generally to form such rules and regulations as might be deemed necessary to the purpose of their institution. The Board at Fort William, added Hastings, though hitherto had reserved to itself the office of supervision and regulation of the inferior courts could get no time to execute that office, which task might now be taken up by a person carrying high authority and with learning and experience qualifying him for the responsible position. Hastings also held that the installation of the Chief Justice of the Supreme Court in the office of the Judge of the Sudder Dewanny Adawlut would help regulating the conduct of the Supreme Court and the jurisdiction of the Provincial Councils and the Provincial Dewanny Adawluts and would thus obviate the danger of frictions arising between the Supreme Court on the one hand and the Provincial Councils and Dewanny Adawluts on the other. It was further observed by the Governor-General that by persuading the Chief Justice of the Supreme Court to hold simultaneously the judgeship of the Sudder Dewanny Adawlut as well it might be possible to minimise the causes of friction between the Board of Revenue, which was for all practical purposes the Governor-General and Council, and the Supreme Court of the time.

On October 18, 1780, Sir Elijah Impey accepted the new office and continued as judge of the Sudder Dewanny Adawlut till November 15, 1782, on which date he was required to vacate his new office in obedience to the commands of the Court of

Directors. The first ten months of his appointment to the judgeship of the Sudder Dewanny Adawlut saw a compilation by him of a code of regulations for the operation of the Sudder Dewanny Adawlut and the Provincial Dewanny Adawluts. On 3 November, 1780, thirteen Articles prepared by the Judge and approved by the Government were passed into law. These regulations with additions and alterations were incorporated in a great volume of regulations consisting of 95 Articles enacted on 5th July, 1781. The Preamble to these Regulations of 1781 explained their manifold uses. Their aim was to explain the rules, orders, and regulations which might be considered ambiguous; to revoke such as might be repugnant or obsolete; to enact one consistent code, to prescribe a general table of fees for the various transactions in the mofussal courts of civil justice, to formulate the procedure and jurisdictions of these courts, to make the rules, regulations, and ordinances binding on these courts cognoscible to the people under their jurisdiction; to inform the suitors of the grounds enabling them to prefer appeals to the Sudder Dewanny Adawlut from the decrees of the mofussal Dewanny Courts; and to save the litigating public as far as possible from the extortions or frauds perpetrated by the unscrupulous officers of the Courts. These Regulations have been accepted, in the history of codification in British India, as the first regular and systematic attempt to codify the law of civil procedure in British India. Sir Elijah Impey's Code was translated into Persian by William Chambers in 1781, and into Bengali by Jonathan Duncan in 1783.¹⁸

Warren Hastings left Bengal in 1785. In 1786 Lord Cornwallis came to India as the next Governor-General. In 1793 all the existing Regulations were collected by the Council which passed them as a revised code. Section 2 of Regulation VI of 1792 dealt with the constitution of the Sudder Dewanny Adawlut and reproduced the old law that the Court would consist of the Governor-General and the members of his Council. In 1801 it was provided that the Sudder Dewanny Adawlut would henceforth consist of three judges, to be denominated respectively,

¹⁸ The Persian translation by W. Chambers was printed in 1782, and the Bengali version by Duncan in 1785. The Judicial Regulations of 27th June, 1787, were also printed in Persian and Bengali in the same year.

Chief Justice, Second and Third Judges of the Sudder Dewanny Adawlut.¹⁹ It was further laid down that the said Chief Justice would not be the Governor-General, nor the Commander-in-Chief, but would be one of the members of the Supreme Council, and that the said second and third judges would be selected and appointed by the Governor-General in Council from among the covenanted civil servants of the Company not being members of the Supreme Council. Before this prohibition in 1801 against Governor-General acting as the Chief Justice, Earl Cornwallis sat as one of the Judges of the Sudder Dewanny Adawlut.²⁰ The judicial proceedings of the Sudder Dewanny Adawlut also show that Sir John Shore, Governor-General, 1793-1798, likewise decided a few cases.²¹ In 1805 it was enacted that the Chief Justice would be selected from among the civil covenanted servants of the Company, not being members of the Supreme Council.²² Two years after it was again required that the Chief Justice was to be a member of the Supreme Council. The number of puisne judges was increased from two to three to be selected from among the Company's covenanted servants.²³ The constitution of the court was finally fixed in the year 1811 when it was provided that the court would consist of a Chief Justice and as many puisne judges as the Governor-General in Council might from time to time deem necessary for the despatch of the business. It was also provided that it was not necessary that the Chief Justice should be a member of the Supreme Council.²⁴ In 1814 it was laid down that a candidate for the judgeship of the Sudder Dewanny Adawlut must have qualified himself by having previously officiated as Judge of a Provincial Court of Appeal or of a Court of Circuit for a period not being less than three years or by having been previously em-

¹⁹ Section 3 of Regulation II of 1801

²⁰ The proceedings of the Sudder Dewanny Adawlut, 1792; see also Prankishen Singh vs. Mt. Bhagwutec, 25 April, 1793, Macnaghten's Reports, Vol. I, 5. See also Morley's *Analytical Digest*, Vol. I, 1850, p. 595, citing I.S.D.A. Rep. 3

²¹ The proceedings of the Sudder Dewanny Adawlut, 1795; proceedings dated 22nd January and 4th June, 1795, for examples. The case decided on 4th June, 1795, was Butchnoo Jha — appt. v. Domee Saho — respt.

²² Regulation X of 1805

²³ Regulation XV of 1807

²⁴ Regulation XII of 1811

ployed in the judicial department or in offices requiring the discharge of judicial functions, whether of a criminal or civil nature, for a total period of not less than nine years.²⁵ As this provision restricted the field of choice, it led to practical difficulties in the matter of selection of judges for the Sudder Dewanny Adawlut. So, this provision was rescinded in 1823.²⁶ In 1829, again, the denomination of Chief, first, second, third, etc., Judge was discontinued.²⁷ The constitution thus fixed remained unaltered till the abolition of the Court in 1862.

According to Hastings's plan drafted at Cossimbuzar on 15 August, 1772, and adopted by Governor and Council on the 21st day of the same month the jurisdiction of the Sudder Dewanny Adawlut extended to the hearings of appeals from the Provincial Courts in causes exceeding Rs. 500/-. The Court was created by the Governor and his Council and did not receive any recognition by a parliamentary statute until 1781 when, by 21 Geo. III. c. 70, it was declared to be a court of record and its judgements were made final and conclusive except upon appeal to His Majesty in suits the value of which was five thousand pounds and upwards. Later on, this limit was declared to be equivalent to Current Rs. 50,000.²⁸ The appellants had however to satisfy certain conditions as to the filing of appeals to His Majesty in Council. Petitions of appeals had to be presented to the Sudder Dewanny Adawlut within six calendar months from the date on which the judgment appealed against had been passed. It was a matter of discretion for the Sudder Dewanny Adawlut in case of appeal to His Majesty in Council either to order their judgment to be carried into execution, taking security from the party in whose favour the same may have been passed, or to suspend the execution thereof taking the like security from the party left in possession of the property adjudging against him. The security was insisted upon in order to give effect to the order or decree as His Majesty, his heirs, or successors might think fit to make on the appeal preferred. In all cases, however, security was to be given by the appellants to the satisfaction of the Sudder Dewanny Adawlut for the payment of all such costs as the Court might think likely

²⁵ Regulation XXV of 1814

²⁶ Regulation IV of 1823, Section 8

²⁷ Regulation III of 1829

²⁸ Regulation XVI of 1797

to be incurred by the appeal as well as for the due performance of such order and judgment as His Majesty, his heirs or successors might think fit, to give thereupon.

In 1793, the power of admitting special appeal in all cases, which power the Provincial Courts of Appeal possessed as respects the decrees of the City and Zilla Court, was vested in the Sudder Dewanny Adawlut.²⁹ The jurisdiction of the Court was clearly defined in the same year.³⁰ The Court was empowered to receive any original suit cognisable in any Zilla or City Court and to command the judge of such inferior court to receive the suit and to proceed to hear it provided it was shown that the judge refused to proceed with it and the party applied to the Provincial Court of Appeal of the division and such court refused to command the judge to receive it.³¹ Similarly, the Court was empowered to receive any appeal from a decision of Zilla or City Court which was cognisable in any Provincial Court of Appeal and which the latter had refused to receive.³²

Regulation VII of 1793, defined the appellate powers of the Court and empowered it to hear appeals from the decrees passed by the Provincial Courts of Appeal in the following cases:

(1) Suits for *lakeraj* lands, the annual produce of which exceeded one hundred rupees.

(2) Suits for revenue-paying lands, or for any dependent taluk, the annual produce of which exceeded one thousand rupees.

(3) In all other cases where the decree was for a sum of money or personal property, or real property, not of the description before mentioned, the value of which exceeded one thousand rupees.³³

From all decrees of the Provincial Courts in cases where the value of the thing decreed exceeded one thousand rupees appeal lay to the Sudder Dewanny Adawlut. The concession granted to the public proved an obsession to the satisfactory discharge of other responsibilities of the Governor-General in Council

²⁹ Regulation VI of 1793

³¹ Section 4, *ibid.*

³³ Section 10, *ibid.*

³⁰ Regulation VII of 1793

³² Section 5. *ibid.*

who with the assistance of a Kazi, two Mooftis, two Pundits, a Registrar, assistants and ministerial officers constituted the Sudder Dewanny Adawlut. Accordingly in 1797, the limitation of appeal was raised higher by fixing the amounts or values appealable that exceeded five thousand rupees. This limitation pertained to suits of money or personal property.³⁴ This having proved, again, an insufficient deterrent, the limitation was extended in 1798, to real property of the same estimated value.³⁵

In 1801 a summary appeal whatever might be the value of issue was directed to be cognisable by the Sudder Dewanny Adawlut where the court below had refused to admit a regular appeal on the ground of delay, informality or other default in preparing it.³⁶ In 1805, the Sudder Dewanny was invested with power of receiving special appeals from the decrees of the Provincial Courts in cases not open to a regular appeal.³⁷ The limitations with regard to the value of the suits in order to determine the question of appealability were done away with in 1814. It was laid down that an appeal would lie to the Sudder Dewanny Adawlut in all suits tried in the first instance by the Provincial Courts and that a second or special appeal would lie from the judgments passed by the Provincial Courts on appeals from the original decisions of zilla and city and assistant judges.³⁸ In 1831 provision was made for the establishment of the Court of Sudder Dewanny Adawlut and Nizamut Adawlut for the North Western Provinces. It was provided, that the new court would consist of one or more judges and would have a registrar to be styled 'Register' to the Sudder Dewanny and Nizamut for the Western Provinces and such other officers as might be deemed necessary.³⁹ Under Regulation VI of 1831, under which it was constituted, the Court was to be ordinarily stationed at Allahabad. By Section III of the same Regulation, this Sudder Dewanny Adawlut was the chief civil court for the North-Western Provinces. It had been later re-

³⁴ Regulation XII of 1797

³⁵ Regulation V of 1798

³⁶ Sections 8 and 9 of Regulation II of 1801

³⁷ Section 10 of Regulation II of 1805

³⁸ Section 5 of Regulation XXV of 1814

³⁹ Section 4 of Regulation VI of 1831

⁴⁰ Regulation V of 1831

moved to Agra by Proclamation of the Governor-General under clause 2 of the same Section of the said Regulation. In the same year, again, provision was made for the appointment of the Principal Sudder Ameens.⁴⁰ It was also declared that the Provincial Courts would be precluded from receiving any appeals from Zilla or City Judges thus preparing for the ultimate abolition of the Provincial Courts which took place in 1833. Section 26 of this Regulation defined the appellate powers of the different classes of Courts in the following manner :

(1) In appeals from decisions of Munsiffs or Sudder Ameens, the decisions of the Zilla or City Judge would be final.

(2) In all suits originally decided by the Principal Sudder Ameens, an appeal would lie to the Zilla or City Judge, and further or special appeal to the Sudder Dewanny Adawlut.

(3) In all suits originally decided by the Zilla or City Judge an appeal would lie to the Sudder Dewanny Adawlut.⁴¹

The clause (2) above was modified in 1837 by providing that in suits, valued at above five thousand rupees, tried by Principal Sudder Ameens, appeals would lie direct to the Sudder Dewanny Adawlut.⁴² Subject to these modifications the provisions of the year 1831 continued to determine the jurisdiction of the Sudder Dewanny Adawlut till its abolition in 1862.

John Herbert Harington in *An Elementary Analysis of the Laws and Regulations enacted by the Governor-General in Council at Fort William in Bengal* pointed out⁴³ that the proceedings of the court of Sudder Dewanny Adawlut were formerly kept in the English language but that under the constitution of the court as made by Regulation II of 1801 the practice of keeping English proceedings was discontinued in favour of Persian. Thus in the second edition of the first volume of reported cases covering the period 1791-1811 published by W. H. Macnaghten in May 1827, the learned editor observed that the proceedings of the Sudder Dewanny Adawlut were recorded in that language and that it was very rarely that an English minute was placed on record and that such a minute when re-

⁴¹ Section 28, *ibid.*

⁴² Section 4 of Act XXV of 1837 ⁴³ Volume I, p. 142

sorted to only contained what the Persian record had already in substance. From 1843, however, the decisions of the Sudder Dewanny Adawlut were recorded again in English.⁴⁴

W. H. Macnaghten published a series of reports of cases decided by the Sudder Dewanny Adawlut. His first volume contained decisions covering the period 1791-1811; the second 1812-19, the third 1820-24, and the fourth 1825-29. J. C. Sutherland published the fifth volume comprising the period 1830-34; the sixth 1835-40, and the seventh 1841-48. This series was discontinued from 1 January, 1849, under a resolution of the court dated 27 April, 1849. Notes were appended to the cases in the first volume. They were written or appended by the judges by whom the cases were decided. The notes explaining intricate points of Hindu law were specially valuable as they were prepared by Colebrooke. This series did not contain the names of the lawyers engaged.

There was another series of reports known as *Selected Reports of Summary Cases*. This series after 31 December, 1848, ceased to be "approved by the Court" by the resolution of 27 April, 1849. A third series of reports was published by Sevestre, one of the pleaders of the Sudder Dewanny Adawlut. This series consisted chiefly of the reports of cases in summary appeals decided by the Sudder Dewanny Adawlut. The first volume of this third series was completed in 1842. Its second volume covered the period 1842-49; the third 1850-55, the fourth 1855-57, the fifth 1858-59, and the sixth 1859-60.

A fourth series was started in the year 1845. This series has been described as *Decisions of the Sudder Dewanny Adawlut, Recorded in English, in conformity to Act XII of 1843*. It was started under the Governor of Bengal and was published monthly. This series was continued till the abolition of the Court in 1862.⁴⁵

The average annual disposal of work done by the Sudder Dewanny Adawlut during the last quarter of the 18th century was not large. Most of the records for that period are not

⁴⁴ Act XII of 1843

⁴⁵ A. C. Karkoon; *University Law College Magazine*, Calcutta, Vol. X, No. 2, April, 1940, pp. 63-72, 'Sudder Dewanny Adawlut or The Sudder Court of Bengal, (1772-1862)'

extant. The "Register's" report of depending causes in the Sudder Dewanny Adawlut on the 30th June, 1796, shows that only 41 appeals were pending.⁴⁶ The abstract of decrees passed by the Sudder Dewanny Adawlut for 1st January to 30th June, 1796, likewise shows that only 7 decrees were passed of whom 1 was filed in 1792, 5 in 1795 and 1 in 1796. The total number of causes decided by the Sudder Dewanny Adawlut from the 1st day 1793, to the end of December, 1797, had been 62.⁴⁷ Register's Report on the Half Yearly report of Causes pending in the Sudder Dewanny Adawlut, the Provincial Courts of Appeal, Zilla and City Courts on the 1st January 1799,⁴⁸ gave the following statistics:

Appeals depending in the Sudder Dewanny Adawlut on the 1st January, 1799, compared with the number depending on the 1st July 1798

Depending on the 1st July 1798 as per report of that date	152
Admitted in the 1st 6 months	25
Decided in the last 6 months as per report on the 31st	
December, 1798	13
	164

With the passage of time the volume of work rendered by the Adawlut increased. The court had for the period 1830-40 as an annual average 434 regular appeals depending at the close of the former year and 264 regular appeals admitted during the year. Of these 698 regular appeals, 189 were decreed on trial, 62 were dismissed, adjudged or transferred, and 447 were pending at the close of the year. For the same period the Court had on an annual average 199 special appeals depending at the close of the former year, and 116 special appeals admitted during the year. Of these 315 special appeals 92 were decreed on trial, 18 dismissed, adjudged, or transferred, and 205 were pending at the close of the year.⁴⁹

⁴⁶ Proceedings of the Sudder Dewanny Adawlut for 1796

⁴⁷ Proceedings of S.D.A. for 1799 ⁴⁸ Proceedings of S.D.A. for 1799

⁴⁹ Records, High Court, Calcutta, Abstract Statement Showing Regular and Special Appeals admitted, decided and remaining at the end of each year from 1830 to 1840 before the Sudder Dewanny

Though itself not much occupied with regular appeals, the Adawlut urged, where required, the judges of the courts below to dispose of a larger number of causes than they may have done during the year. The lower courts had to give explanation to the Sudder Dewanny if the out-turn of their work appeared inadequate in its volume. They were also occasionally reminded of the Sudder Court's circular order for expediting work.

Parties could move the Sudder Dewanny Adawlut direct as the appellate court or through the courts below in which latter case the necessary papers would be forwarded by them to the Sudder Dewanny Adawlut. In case of delay in forwarding the application of any petition the party or petitioner could move the Sudder Dewanny itself. Suits *in forma pauperis* were allowed by the Sudder Dewanny in many cases, on the appellants taking the necessary oaths, giving evidence and security before the Zilla Judges of the areas.

Suits were occasionally referred to arbitration and decrees passed in terms of the awards made; such decrees were executed like other decrees. The awards of the arbitrators were not to be set aside except on proof of partiality or corruption by the oath of two witnesses.⁵⁰

The Sudder Dewanny Court sought with care the views of the pundits attached to it in the matter of adjudication of the claims of the Hindus to be governed by their personal laws. The pundits were required to pursue the proceedings and deliver their opinions on the case therein established.⁵¹ Their *bebas-thas* were given in Bengali and translated into English for the convenience of the court. Thus as early as the last decade of the 18th century, the considered opinions of the pundits were received on a variety of questions involving *ras jatra*, *shewah poojah*,⁵² inheritance, legitimacy, partition and such other usages and laws. The proceedings show that the views of the pundits had been strictly adhered to.⁵³ The English judges do not seem to have exercised their own sense of justice, equity and good conscience in cases involving the personal laws and cus-

⁵⁰ Bengal Regulation XVI of 1793

⁵¹ Regulation IV of 1793

⁵² Kishunchund Ghosain v. Kishunmohun Ghosain, proceedings, 16 April, 1795

⁵³ Proceedings of the Sudder Dewanny Adawlut 1792-99

toms of the Hindus. Thus about the validity of adoption made in a particular way, or the question of inheritance in a monastery, the nature of the incidence of a religious endowment, acquisition by the member of a joint family, widow's right, bequest, caste, and marriage the opinions of the pundits were accepted as the authority over the matter.⁵⁴ The pundits of the Zilla or City Court, the Provincial Court of Appeal, and of the Sudder Dewanny Adawlut respectively might well differ in their opinions on the points of reference, but the judges of the respective courts are found to have scrupulously followed their *bebasthas* and based their decision thereupon.⁵⁵ The judges of their own initiative searched in the records of the courts to see whether parallel cases had been earlier determined and the personal law thus settled. The opinions of the pundits of the superior court had to be of necessity given a larger authority than those of the pundits of the courts below.⁵⁶ Sometimes the judges of the courts forwarded questions for the opinion of the pundits of the Sudder Dewanny Adawlut. The parties also could of themselves forward, in cases on appeal, the opinions of the pundits outside.

The Brahmin pundits were very serious in their task. They consulted and cited all the relevant authorities in order to justify their *bewasta* that was to be submitted on reference by the court on a particular issue. In the year 1811, for example, in *Mt. Solukhina—appellant—and Ramdolah Pande and others—respondents*—the pundits in order to arrive at their decisions adverted to authorities like Manu, Devala, Marichi, Sancha and Vrihaspati, Atri, Juggernath's Digest, Dattaka Mimansa, and Jemutavahana, whose citations had been welcome to the judges concerned.

The Sudder Dewanny Adawlut might review its own decisions, not appealable to King in Council, if the circumstances of the case required it and would decide on the admission or rejection of the new evidence tendered.⁵⁷ It might also admit a special appeal, where the amount involved was insufficient for

⁵⁴ Elder Widow of Raja Chutter Sein and Younger Widow of Ditto (1807)

⁵⁵ Kerutnaraen and Bhobinesree (1806)

⁵⁶ *Mt. Bijya Dibeh and Mt. Unpoorna Dibeh; Purtab Bahaudur Sing and Anr. and Tilukdharee Sing* (1807)

⁵⁷ Regulation II of 1798

jurisdictional purpose, if the decision appeared erroneous or the nature of the cause as being of sufficient importance.⁵⁸ It would also authorise a review of unappealable decisions in Zilla, City, or Provincial Courts and would decide on the admission

⁵⁸ Regulation II of 1801; Regulation II of 1805

or rejection of new evidence.⁵⁹

The judges of the Adawlut, in the *Reports of Civil Causes, revised and selected for publication by the Judges of the Court*, used to specify, under the head 'Remarks', the law especially decided and observed that the law they decided and printed might be taken as the precedent in the subsequent case of similar circumstances.⁶⁰ The Adawlut in its anxiety to be consistent in its decisions attempted to prescribe limitations for the precedents of its earlier decisions by describing the nature of the circumstances involved therein and the evidence produced.⁶¹ The nature of the precedent established by a particular decision was recorded in order to avoid "contrariety of decision" made by the Sudder Court.⁶²

In the matter of discovery and recognition of the law and usage of the parties the Court recorded the observation that a particular law or usage could not be considered a precedent to override the law and usage of the other parts of the Province.⁶³ Sometimes the Regulations themselves made necessary declaration to the above effect. Regulation X of 1800, for example, declared that in the Jungul Muhals of Midnapur and of other districts courts were to be guided by local custom in matters of inheritance.

Suits defended on the part of the Government were tried under the same rules and regulations as suits between individuals.⁶⁴

The Sudder Dewanny Adawlut had considered itself a court of judicature not concerned with the acts of administration. The grants of the Naib Nazim and the decrees passed by any former judge or any superintendent of a court having compe-

⁵⁹ Regulation XXV of 1814

⁶⁰ J. Queiros and Khudija Nufuz Khan (1807)

⁶¹ Juggat Ram and Enayut Ullah (1807)

⁶² Gunes Gir and Amrao Gir (1807)

⁶³ Ram Gunga Deo and Doorgamunee Jobraj (1809)

⁶⁴ Regulation III of 1793

tent jurisdiction had to be recognised by the Sudder Dewanny under the express terms of Section 16 of Regulation III of 1793. Though the civil courts were thus prohibited from entertaining any cause which was thus adjudicated upon by competent authorities the Sudder Court had been approached for redress by parties who deemed themselves aggrieved by the awards or decrees of the preceding authorities. The Sudder Court gave such petitions its careful consideration and expressed its inability in the matter.⁶⁵ The case of *Nubokissen Photedar — petitioner* — can be cited to illustrate that the Sudder Dewanny was not concerned with the convenience of the Administration. A judge ordered, under Sections 41 and 91 of Regulation X of 1819, the confiscation of a boat of 500 maunds of salt covered by a *rewannah* because on weighing the salt at the *chokee*, there was found to be an excess of 18 maunds and 14 seers. The party affected urged, in appeal to the Sudder Dewanny Adawlut, that the salt darogah had caused his people to run away and that the salt was weighed in his absence, contrary to the rules of practice issued for the guidance of the Salt Department of the Board of Customs, Salt and Opium. The Sudder Dewanny Adawlut was of the opinion that when cases came before a court of justice, the law, and the law only, should govern the decision, and that in order to give bye-laws the force of law, the law must authorise an authority to prescribe rules for the guidance and conduct of its subordinates, which bye-laws, when sanctioned by Government, were to be declared to have the same force as the law itself; but that there was no such provision in Regulation X of 1819, and that, consequently, the Board's Circular Order could not be considered binding on the Judge.

The proceedings of the courts below had to be conducted agreeable to the Regulations, or it would be ordered by the Sudder Court to try the suits *de novo*.⁶⁶

It was held by the Sudder Dewanny Adawlut that the act of submission by covenant to the jurisdiction of the Supreme Court

⁶⁵ Hurryhur Chowdry and Anr. and Rungoo Beebee (1810)

⁶⁶ Anuda Pershad Roy vs. Mt. Bhyrobee Dasse (1842), cited, Morley; *Analytical Digest*, Vol. I, 1850, p. 655, Anooda Pershad Ray, etc. Ram Ram Beish vs. Biraj Mohun Dutt (1845); Sutrunjeeb Pal and Ors. vs. Hurree Doss Baboo and Ors. (1851); Rajah Armurdun Sahee vs. Sheo Dial Oopudiah

did not bar the jurisdiction of the courts in the interior.⁶⁷ It was further held that the Company's courts could have co-extensive jurisdiction with the Supreme Court. The Zilla Court, for example, was declared to have its jurisdiction in case of merchants trading in Calcutta. But when a cause had been pending in the Supreme Court, the jurisdiction of the said lower courts was barred.⁶⁸ The authenticity of a particular will could however be inquired into after the Supreme Court had granted its probate and letter for administration.⁶⁹ The decree of the Supreme Court could not however be so enquired.⁷⁰

The Regulations proposed by the Sudder Dewanny Adawlut were passed by the Governor-General in Council without delay. The Court in the first stage of its life used to inform the Governor-General in Council of its construction of important Regulations. The Sub-Secretary to the Government, for example, in his letter, dated, Council Chamber, the 20th September, 1798, informed the Sudder Dewanny Adawlut that the Governor-General in Council had directed him to inform the Sudder Dewanny Adawlut that the Government had entirely concurred with the Sudder Dewanny Adawlut in its construction of Section 18, Regulation V of 1793. The Court might propose Regulations regarding matters within their cognisance. Such Regulations were to be drafted in the prescribed form and submitted to the Governor-General in Council. Regulations prepared by the Zilla and City Judges were to be forwarded to the Sudder Dewanny Adawlut through the Provincial Court of Appeal, with a letter stating the court's approval or disapproval.⁷¹

The judges of the lower courts were also expected to suggest reforms for a better administration of justice. Unworkable and vague proposals were however not welcome. Thus the Deputy Register of the Sudder Dewanny Adawlut in his letter of the 1st November, 1797, to the Zilla Judge (John Stonhouse)

⁶⁷ Surajnarayan vs. The Assignee of the late Firm of Palmer & Co. (1833)

⁶⁸ Rai Pran Kishen Mitter vs. Motee Soundree (1842); Bishnoo Churn Singh vs. Degumberee Dossea and Ors. (1842)

⁶⁹ Hurrichunder Chunder vs. Ram Rutten Mitter and Anr. (1841)

⁷⁰ Beydnath Ghosal and Anr. vs. Mr. Alexander Devrell (1844); Mr. Richard Vanghan and Anr. vs. Nicholas Demetrius Elias (1844); Nobin Kishen Huldar vs. Bissummer Seil (1857)

⁷¹ Regulation XX of 1793; Regulation XXIX of 1795

censured the said Judge for his observations made at different times regarding the administration of justice in the Zilla of Chittagong on the ground that his observations had been undefined and loose and unaccompanied with any propositions to alter them and had, therefore, been unnecessary and improper.

The Sudder Dewanny Adawlut had always attached due importance to the causes coming before it. In serious cases of law a number of judges would participate in their deliberations. The Resolution of the 3rd December, 1836, for example, provided that when a judge of the court might wish to refer to the other judges any doubtful point of law, he should draw up in English a brief statement of the case, for the opinion of the English Sitting after obtaining which, he should either dispose of the case himself, or with two or more judges sitting with him.⁷² In *Reed versus Raneé Sidhwatta and others*,⁷³ a full court was convened at the request of H. T. Raikes and decided upon the period of appeal allowable to the parties. It was decided in this case that the Sudder Dewanny Adawlut had no authority to enlarge the period of appeal to Her Majesty in Council which was six months from the date of making the necessary judgment and orders.

The appealable amount to His Majesty in Council was £ 5,000 or upwards.⁷⁴ This amount of £ 5,000 was rated at Rupees 43,103.⁷⁵ By Regulation XVI of 1797, £ 5,000 was declared to be equivalent to Rs. 50,000. Later on⁷⁶ the value was reduced to Rs. 10,000 which amount continued as the mark of jurisdiction till 12th October, 1949, when the jurisdiction of His Majesty's Council was abolished by the Constituent Assembly of India. By Construction No. 1102 of the 18th August 1837 no appeal could lie to Her Majesty in Council from the orders passed by the Sudder Dewanny Adawlut in miscellaneous cases. The rules proclaimed by Her Majesty in Council on the 10th

⁷² Musst. Pootec Begum, petitioner, 1840

⁷³ Proceedings, 25 April, 1849. See also S.D.A. Summary Decisions, March, 1855, p. 126, Raja Roudernarain, petitioner

⁷⁴ 21 George III, c. 70

⁷⁵ Beng. Ben. Reg. XVI of 1797

⁷⁶ The amount appealable to the Sovereign in Council had been fixed at the sum of 10,000 Company's rupees for all the Courts in India, by the Order in Council of the 10th April, 1838

April, 1838,⁷⁷ became governing. Only regular cases were appealable and not interlocutory orders of the Sudder Dewanny Adawlut.

Under Section 1 of the High Courts Act, (24 and 25 Vict. c. 104) it was provided that it should be lawful for Her Majesty by Letters Patent under the Great Seal of the United Kingdom to erect and establish a High Court of Judicature at Fort William in Bengal for the Bengal Division of the Presidency of Fort William. Letters Patent were issued by Her Majesty on 14 May, 1862, constituting the High Court in Bengal. Clause 1 of the Letters Patent established the High Court as from the date of this publication. The Letters Patent were published in an extraordinary issue of the Calcutta Gazette on 1 July, 1862, and in the ordinary gazette on 2 July 1862. So on the first day of July, 1862, came into existence the High Court of Judicature at Fort William in Bengal amalgamating⁷⁸ the Sudder Dewanny, the Sudder Nizamut and the Supreme Court of Judicature at Fort William in Bengal. The judges of the Supreme Court and the Sudder Dewanny Adawlut became the judges of the High Court without further appointment, and the Chief Justice of the Supreme Court, Sir Barnes Peacock, became the Chief Justice of the High Court. Thus the two judges of the Supreme Court, five judges of the Sudder Dewanny Adawlut and five newly appointed judges became the first batch of puisne judges of the High Court of Judicature at Fort William in Bengal.⁷⁹

⁷⁷ Calcutta Gazette, 6 October, 1838, p. 713

⁷⁸ Section 8 of 24 and 25 Vict. c. 104 ⁷⁹ Section 3, *ibid.*

IV

THE SUDDER NIZAMUT ADAWLUT

THE SUDDER Nizamut Adawlut like the Sudder Dewanny Adawlut had originated in the Regulations of August, 1772, received the common appellation of Sudder Court in 1842,¹ and was abolished on 1 July, 1862, under the Charter responsible for the establishment of the High Court of Judicature at Fort William in Bengal.²

With the removal of the Sudder Nizamut Adawlut from Moorshedabad to Calcutta in 1772, Hastings persuaded the mother of the boy Nawab to allow her consent to the nomination of a deputy to her minor son to reside in Calcutta with delegated powers and to affix the Nizam's seal and signature on his behalf to the warrants issued for the execution of the sentences of the Nizamut Adawlut in order to prevent the delays caused by the process of sending to Moorshedabad the *fatwas* of the Sudder Nizamut sitting at Calcutta for the Nawab's warrant signature. The process of obtaining the Nawab's signature at Moorshedabad while he was a minor might lead, Hastings thought, to partiality and corruption in the matter of securing the Nawab's approbation and disapprobation of the findings of the Sudder Nizamut Adawlut at Calcutta. This step of Hastings was approved by the Council on 23 November, 1773. Sudr-ul-Huq Khan, the Darogah of the Sudder Nizamut Adawlut at the time, was given the office of the Nawab's Deputy and continued in office till 14 April, 1775. The seal was delivered to the Deputy. The President at Fort William was requested to superintend the Nawab's Deputy in the exercise of the new office as well as in revising sentences of the Adawlut as in passing the warrants and affixing the seal. Meanwhile, Mahomed Reza Khan was acquitted by the Board of Enquiry held at Calcutta. The Court of Directors on information of Reza Khan's acquittal desired his re-instatement in the Company's employ. Accord-

¹ Act VIII of 1842

² Section 8 of 24 and 25 Victoria c. 104

ingly, on October 18, 1775, the Council at Fort William by a majority ordered that Mahomed Reza Khan be acquainted, among other things, that the Governor-General and Council had been pleased to recommend him to the Nawab Mobarak O'Doula to be the Naib Subah, or Minister of the Sircar, and guardian of his minority, with authority to transact the political affairs of the Sircar, to superintend the foudary courts and the administration of criminal justice throughout the country and to enforce the operation of the same on the existing establishments or to new-model or correct it. As the Board of Revenue wished that he should have full control of the criminal courts in character of the Naib Subah, the Council proposed to remove the Nizamut Adawlut in October, 1775, from Calcutta to Moorsheadabad to be held there for 15 years till 1790 when it was again transferred back to Calcutta by Lord Cornwallis to stay at the latter place till its abolition.

Lord Cornwallis found the general state of the administration of the criminal justice throughout the Provinces of Bengal, Bihar and Orissa exceedingly and notoriously defective. Prisoners were tried in subordinate criminal courts of the districts far away from Moorshedabad, the seat of the Superior Criminal Court. The trials were referred to the Nizamut Adawlut only for final sentence. From the time of their commitment by the Magistrate the prisoners had to remain in custody of the Darogah or Judge of the criminal court of the District where they had been apprehended till the time of conviction or release, and in certain cases its final approval by the Nizamut Adawlut at Moorshedabad. The Darogah or the Judge of the district criminal court had been the sole authority to determine the date of trial, to choose the witnesses to be summoned, to select the points of examination, and to decide the manner in which the evidences would be taken down. The English Magistrates did not interfere in these trials. The local Judges or the Darogahs had thus the full privilege to frame the proceedings in any way they pleased. They were thus in a position to frame the proceedings in a way which would ultimately lead to the acquittal of the prisoner in the Sudder Nizamut Adawlut. They could also by protracting the trial, compel the prosecutors to abandon the prosecution or agree to a compromise, whatever the gravity of

the case. To remedy this state of things,³ a Regulation was passed on 3 December, 1790, which provided that the Sudder Nizamut Adawlut be transferred from Moorshedabad to Calcutta to be established at the latter place consisting of the Governor-General and Members of his Council to be assisted by a Chief Kazi of the three Provinces and two Mooftis. Thus from this time onward the Governor-General and Council became directly responsible for the administration of the criminal justice as well. The Governor-General and the Commander-in-Chief so long as members of the Sudder Courts, used to sit as the President and Vice President respectively when they were not pre-occupied with and thus absent on public service.⁴ This constitution of the Sudder Nizamut Adawlut had been reiterated in Section 67 of the Regulation IX of 1793 when the Council collected all the existing Regulations and passed them in the form of a revised Code. In 1801 it was decided that the Sudder Nizamut Adawlut was to consist of three Judges, to be respectively denominated the Chief Judge, the Second Judge, and the Third Judge of the Nizamut Adawlut.⁵ They were to be assisted by the Head Kazi of Bengal, Bihar and Orissa and Benares, and two Mooftis. The said Chief Judge was not to be the Governor-General or the Commander-in-Chief, but was to be one of the Members of the Supreme Council, to be selected and appointed by the Governor-General in Council. The said Second and Third Judges had to be selected and appointed by the Governor-General in Council from among the covenanted civil servants of the Company, not being Members of the Supreme Council at Fort William. In 1805, it was no longer necessary that the Chief Justice was to be a Member of the Council.⁶ This new provision of 1805 was rescinded in 1807 by Section 2 of Regulation XV of the same year. The same Regulation, again, required that the Court was in future to consist of a Chief Judge, being a Member of the Supreme Council but not the Governor-General nor the

³ Lord Cornwallis's Minute, 1 December, 1790

⁴ Proceedings of the Sudder Dewanny Adawlut for the year 1792; Proceedings of the Sudder Nizamut Adawlut, dated 8 August, 1792, for example; and Proceedings of the Sudder Dewanny Adawlut for the year 1795

⁵ Section 10 of Regulation II of 1801

⁶ Section 2 of Regulation X of 1805

Commander-in-Chief and of three Puisne Judges to be selected from among the Company's covenanted servants.⁷ The pressure of business required that the constitution of the court should be more general and flexible. Accordingly, in 1811 it had to be provided that the courts of the Sudder Dewanny and Sudder Nizamut Adawlut might in future consist of a Chief Judge and of as many Puisne Judges as the Governor-General in Council might from time to time consider necessary for the convenient despatch of the business of these courts. It was also laid down that it was not incumbent that the Chief Justice of the Sudder Nizamut Adawlut would have to be a Member of the Supreme Council.⁸ In 1829 the denominations of Chief, First, Second, Third, etc. Judge was discontinued.⁹ The constitution thus fixed remained unaltered till the abolition of the court in 1862.

When the court was established in 1772 its jurisdiction was prescribed to be twofold. It had, in capital cases, to signify approbation or disapprobation and prepare the sentence for the warrant of the Nizam. Secondly, it had to revise all the proceedings of the foudjary adawluts operating in the districts. From 1772 till 1790 the jurisdiction of the court practically remained unaltered. In 1791, the four Courts of Circuit established under the Regulation of 3 December, 1790, at Calcutta, Dacca, Moorshedabad and Patna were required to transmit to the Sudder Nizamut Adawlut at Calcutta, all trials wherein they disapproved of the proceedings held on trials or of the *futwa* of the law officers. Regulation IX of 1793 in its Section 72 laid down that the Sudder Nizamut Adawlut was empowered and directed to take cognisance of all matters relating to the administration of justice in criminal cases. Section 73 of the same Regulation provided further that the court was to exercise all the powers that were vested in it while it was stationed at Moorsheadabad and superintended by the late Naib Nazim, Mahomed Reza Khan. Section 77 of the Regulation also laid down the procedure to be followed in the Sudder Nizamut Adawlut when proceedings in the trial were referred to it by the Courts of Circuit for the Sudder Nizamut Adawlut's passing the final sentence.

⁷ Section 3 of Regulation XV of 1807

⁸ Section 2 of Regulation XII of 1811 ⁹ Regulation III of 1829

The powers and procedure of the Sudder Nizamut throughout the period of its existence may be summarised as follows.

(1) Regulations IV of 1797 and VIII of 1799 modified the rules of Mahomedan law relating to the award of sentence.

(2) Regulation II of 1801 vested powers in the court of the Sudder Nizamut Adawlut to suspend judges of the Courts of Circuits or the Zillah or City Magistrates for disobedience or neglect of any process or order of the Nizamut Adawlut. This Regulation also did away with the necessity of keeping the proceedings of the Court in the English language.

(3) Regulation VI of 1802 declared that the person who threw away children into the Ganges or the Sea would be guilty of murder. Trials of principals and accomplices in the offence were to be referred to the Nizamut Adawlut.

(4) Regulation LIII of 1803 provided that, if in case of conviction of robbery by open violence, or of murder, or other criminal acts done in prosecution of robbery, the law officers of the Courts of Circuit declared the criminal liable to amputation of limbs, the Judges were either to refer the trial for the sentence of the Nizamut Adawlut or to commute the punishment and pass sentence. If the Judge of the Court of Circuit differed in opinion from the law officer of his court, he was to submit the proceedings to the Nizamut Adawlut.

(5) Under Regulation II of 1807 if a person was convicted for perjury or forgery by a Judge of the Court of Circuit, he might be sentenced to the hard labour for not less than four and not more than seven years. If the Judge thought the sentence too severe, he was to submit the trial to the Nizamut Adawlut for the final sentence. If the Judge of the Court of Circuit differed in opinion from the law officer of his court, he was to submit the proceedings to the Nizamut Adawlut.

(6) Regulation IX of 1807 declared the competency of the Sudder Nizamut Adawlut to call for the proceedings of the Courts of Circuit or Magistrates and revise the sentences passed by them.

(7) Up to the year 1808, two Judges of the Sudder Nizamut Adawlut were necessary to hold a court and no sentence or final award was valid unless passed by the two Judges present.

This rule was modified by Regulation VIII of 1808 which conferred powers upon a single Judge to hold a sitting of the court and to pass orders and sentences.

(8) Regulation XIV of 1810 laid down that the Sudder Nizamut Adawlut might grant a remission or mitigation of punishment in trials before that court without reference to the Governor-General in Council whose power to pardon was reserved.

(9) Regulation VII of 1817 gave power to the Judges of the Sudder Nizamut Adawlut to convict persons when the *futwa* of the law officer recommended acquittal.

(10) Regulation IV of 1822, vested in the Judges of the Sudder Nizamut Adawlut the power of acquitting a prisoner notwithstanding his conviction by the *futwa* of the law officers. The same Regulation also laid down the procedure to be followed by the court, in cases where the heir of a killed or injured person might refuse to prosecute or where mitigating circumstances occurred which might be considered satisfactory by the law officers who might plead them in favour of punishments lighter than the usual ones.

(11) In order to reduce in some degree the number of trials referable to the Sudder Nizamut Adawlut, Regulation XII of 1825 was enacted empowering the Courts of Circuit to pass final sentences without reference to the Sudder Nizamut Adawlut in all cases of culpable homicide not amounting to murder, and in certain other cases. Regulation XII of 1825 further laid down that a single Judge of the Sudder Nizamut Adawlut would not be competent enough to pass a sentence of death.

(12) Regulation IX of 1831 provided that cases of a miscellaneous nature other than criminal trials would not be cognisable by the Sudder Nizamut Adawlut.

(13) Regulation VI of 1832 enacted that the *futwa* by the law officers would no longer be considered indispensable in every case referred to the Sudder Nizamut Adawlut for its final sentence. The Judge or the Judges by whom proceedings of lower courts would be revised could exercise their discretion whether a *futwa* was required or not.

(14) Act XXXI of 1841, for the first time in the history of

the Sudder Nizamut Adawlut, functioning under the direct control of the Governor-General in Council, allowed an appeal from a sentence or order passed in criminal trial by a Sessions Judge. It further provided that the Sudder Nizamut Adawlut might call for the records of any criminal trials of any subordinate court and pass upon them such orders as might be considered equitable. This power of the Sudder Nizamut Adawlut corresponded to the revisional power of the existing High Court of Judicature at Calcutta which succeeded the Nizamut Adawlut in 1862. Section 4 of Act XXXI of 1841 however laid down that the Sudder Nizamut Adawlut whether exercising revisional or appellate powers could not enhance the punishment awarded, nor could it punish any person acquitted by the courts below. This Act also enabled a Sessions Judge to refer a trial to the Sudder Nizamut Adawlut if he was not empowered to pass an adequate sentence.

(15) Act XIX of 1848 authorised the Sudder Nizamut Adawlut to annul, mitigate or refer back sentences of lower courts upon a review of the abstract statements or calendars of prisoners. Besides, the Act also enabled the Nizamut Adawlut to call for the records of the lower courts wherever required.

The Regulations and Acts that were passed between 1790 and 1840 did not enact any provisions for the institution of appeals in the Sudder Nizamut Adawlut from the decisions of the subordinate criminal courts operating in the districts of the three Provinces. Some of these Regulations only provided, as we have seen, for trials being referred to the Nizamut Adawlut by the courts below. Prisoners as such had no opportunity to move the Superior Court for a revision or annulment of his conviction as determined by the trying court below. It seems, therefore, that jurisdiction which was exercised by the Nizamut Adawlut over the inferior criminal courts was in the nature of a general power of supervision and control. It was only in 1841, under Act XXXI of the year that the Nizamut Court got the revisional powers for the first time in its history. This revisional power of the Nizamut Adawlut was only extended in the year 1848 under Act XIX of the year.

Prior to 1841 when Act XXXI was passed conferring revisional

powers on the Sudder Nizamut Adawlut the Adawlut had for the 1833-40 an annual average of 115 cases pending from the previous year, 532 referred during the year of which cases 339 resulted in conviction, 167 in acquittal, 7 dropped on account of casualties, 35 returned and 99 pending for the succeeding year.¹⁰

Regulations were passed to enable the Nizamut to supervise the judicial administration in the Ceded Provinces and in the Provinces of Cuttack, conquered provinces and Zillah Bundelkhand.¹¹

The sentences of the Nizamut Adawlut, for a fine, imprisonment, or corporal punishment, were final; but sentences confirming a forfeiture of land or lease were to be submitted with all proceedings to Government.¹²

Though the Nizamut Adawlut, as its name implies, was concerned only with criminal jurisdiction, it should not mean that the question of the extent of its jurisdiction had never been raised at all. Two leading cases had to be decided in 1846 and 1851 respectively. The Nizamut Adawlut, by a majority, followed in 1851 the precedent set on February 12, 1848, in the decision arrived at by Messrs. Tucker and Hawkins, on the petition of Mr. J. C. Abbot, by which it was ruled that the Nizamut Adawlut had no power to assume to itself cognisance in any manner or for any cause of an order passed by a Sessions Judge or by a magistrate in cases investigated by them under the authority conferred by Act IV of 1840 whose Sections 2 and 4 said that the possession confirmed or given under the orders of the magistrate was to be maintained until the right of the parties disputing was determined by a competent court, subject only to one appeal to the Sessions Judge under Section 8 of the same Act.

The case of 1851 was a miscellaneous appeal (*Dooleh Debia — petitioner vs. Mr. Dalrymple — Opposite party*). It was an appeal against the orders of the Sessions Judge of Moorshedabad confirming the decision of the magistrate of the district in a case

¹⁰ Records: High Court, Calcutta, Abstract Statement of Criminal Appeals admitted, decided and pending before the Court of Nizamut from 1833 to 1840

¹¹ Ceded Provinces Regulation V of 1803; Regulation IV of 1804; Bengal and Ceded Provinces Regulation IX of 1804

¹² Regulation II of 1796

under Act IV of 1840 regarding the possession of certain lands.

Mr. J. R. Colvin, before whom the petition of appeal was first laid, was of the opinion that the case not being a criminal trial, was not cognisable by the Nizamut Adawlut, but the petitioner having cited precedents, the matter was referred to the court at large. The full court consisted of 5 judges of whom Mr. Dick and Sir R. Barlow were in favour of the view that the Nizamut Adawlut had the jurisdiction, while Messrs. Colvin, Dunbar and Mills were against it.

It was decided by the opinion of the majority of judges in the said case that the comprehensive powers of control and interference conferred on the Nizamut Adawlut by Section 24 of Regulation IX of 1807 were modified by Section 3 of Regulation IX of 1831. The resultant was that cases of a miscellaneous nature other than criminal trials were no longer cognisable by the Nizamut Adawlut. To quote the exact words of the judges:

"The Nizamut Adawlut is not a court which possesses an inherent jurisdiction of a wide and transcendent nature over all the proceedings of the subordinate criminal authorities. Its powers have been created, and from time to time defined and restricted, by law and they extend in our view according to the only sound and just construction of Act XXXI of 1841, the law now in force, to a cognisance and review of nothing more than sentences passed in criminal trials.

"It appears that in some instances, orders have been passed by Judges of the Court which are not consistent with the opinion as to the law which we have now given. But it has been the object of the hearing of the present case by all the judges of this court to settle the law and practice on the point authoritatively for the future.

"After the most mature consideration of the subject we are of the opinion that orders passed by the subordinate criminal courts in judicial proceedings other than criminal trials are not cognisable or open to revision by the Nizamut Adawlut, and that in regard to such cases, the Nizamut possesses no jurisdiction."

In the case of *Mullick Choolhun and others* (1851) where it

was held by the majority of the court that a charge against a plaintiff in a civil case of forgery of a *vokalatnamah* filed in the name of the defendant, could be entertained by a magistrate, although not sent to him by the civil court in which it was filed, because it was not a document offered in evidence in the case, within the meaning of Act I of 1848, the court (Present A. Dick, Esq.) was at first of opinion that the commitment must be annulled and the accused released. But before any final decision was made, the esteemed judge, Mr. A. Dick, wished to have the opinion of the other judges. The majority of the judges having declared (Messrs. Jackson, Colvin, and Dunbar for, and Mr. Dick and Sir R. Barlow against) the commitment to be good and valid, the case was gone through, though ultimately resulting, in concurrence with the *futwa*, in the acquittal and immediate release of all the prisoners.

Earlier, on occasions the opinions of the Pundits and Mahomedan law officers were sought for as to the validity of the evidence taken in a particular way. Later when the law was more developed and a consistent procedure evolved by the Sudder Courts by their resolutions, decisions and constructions, the courts were anxious to see that the prescribed procedure was strictly adhered to in the courts below. In *Government versus Shorooopchundo Nath* (1850) the Nizamut Adawlut, agreeing with the Sessions Judge of Mymensing, who acquitted the prisoner, on the plea of the irregularity of the procedure in which the evidence was taken, observed that the Collector acting judicially should have sat in the public court or cutchery room and that the deposition of the prisoner charged and convicted for perjury, having been taken in the verandah of the Collector's house and not in the cutchery, was invalid under the Construction No. 627 of the Nizamut Adawlut. A deposition irregularly taken, it was held, could not be made the ground of conviction for perjury. The same principle was followed in *Government versus Dosstum Nusha and 2 others* (1851).

The judges of the Nizamut seldom evinced a tendency to follow the English precedents. On the contrary they confined themselves within the realm of Mahomedan Law and of the Regulations of the Government. They are found to have carefully weighed the evidence tendered in the light of the laws of

the Indian dominion as opposed to the practice and procedure obtaining in England. In *Kandooree Bewah versus Jhaoolah Nusho* (1851), the court observed that under the existing law the jury in India were required to give reasons for their verdict, so that the judge in sessions and the judge of the Nizamut in appeal or reference, might be able to duly estimate the value of the verdict. The jury were required, observed the court, to state clearly and fully the reasons on which they accepted or rejected the evidence adduced against or for the prisoner as opposed to the practice followed in the courts of law in England.

Similarly, in *Ramkisto Gowala and another* (1859) the court referred to its two previous decisions made in 1857 and 1859 respectively as to be binding on the case in question. In course of proceedings the court also referred to a leading case reported among the English trials being very similar to the case under consideration but relied on its own process of reasoning and on the law and Regulations in force. The case referred to was that of *Thurburn*, cited in *Roscoe's Law of Evidence* of 1857, page 851, Head, Larceny.

The opinion of the majority of the presiding judges would prevail.¹³ But cases were referred to the court at large where the judges divided equally over a particular issue.¹⁴ The judges were not allowed in the least any interposition in the regular course of commitment and trial prescribed by the Regulations.¹⁵ A single judge of the Nizamut Adawlut was not authorised, under Regulation XXV of 1814, to reverse or alter a decision or order of a judge of Circuit, magistrate, or another public officer, or a judge or judges of the Nizamut Adawlut without the concurrence of another judge.

The Adawlut had to pass final sentence according to Mahomedan law under its authorised modifications, and if in any case not provided for by Regulations, the Nizamut Adawlut disapproved of the law, the court would nevertheless adhere to the law, if it was in favour of the prisoner; and recommend to Government pardon or mitigation, if it was against him; and

¹³ *Government vs. Adawlut Sheikh and Anr.* (1859)

¹⁴ *Government vs. Talib Garewan and Anr.* (1859)

¹⁵ Construction to the Benares Court of Circuit, 2 April, 1818

would propose a Regulation to provide for the case in future.¹⁶ So far as it was not superseded by Regulations, the precepts of the Mahomedan law were generally strictly abided by the English Judges. A typical case arose in 1806. The prisoner was declared not convicted by the *futwa*. The charge was one of perjury. Comparison of handwriting was not admitted by Mahomedan law as legal evidence. The judges of the Nizamut Adawlut thoroughly discussed Mahomedan law on the subject and accepted its reasoning as expounded by the various authors of Mahomedan law.¹⁷

In all circumstances, necessitating a minute search of the law, the Nizamut Adawlut ungrudgingly referred the causes to the law officers and satisfied themselves with the discovery of the texts governing the issues.¹⁸ Even on the question of the incidence of extenuating circumstances, the different schools of Mahomedan law were consulted and the eminent judges like Colebrooke and Harington declined to follow the uncertain path of their sense of justice, equity and good conscience.¹⁹

The *futwabs* of the law officers of the courts below were examined by the law officers of the Nizamut Adawlut in consultation with the best authorities for Mahomedan law. Mahomedan law, consequently, instead of being forgotten as abrogated, had been revised and re-studied in the Company's regime. In the courts of law under the Nawab, Mahomedan law was no doubt the law applicable in criminal causes of the subjects *inter se*. But the application of the said law in the Company's courts, as the proceedings of the different grades of the courts of law will show, necessitated its examination and re-examination by a number of classes of the law officers who were indeed learned in the law. The *futwabs* of the law officers of the city and zillah judges, in a large number of causes, were examined by the law officers of the Courts of Circuit and of Appeal. The opinions of the law officers of these Courts of Circuit and of Appeal were, again, reviewed by the law officers of the Nizamut and Dewanny Adawluts. Any discrepancy or difference of opinion among the different grades of law officers had to be explained

¹⁶ Regulation IX of 1793

¹⁷ Vakil of Government vs. Chukkun Lal ¹⁸ Boodhun vs. Ratra (1806)

¹⁹ Ujoodhee vs. Gopeenath and Gungaram (1805)

to the entire satisfaction of the esteemed judges of the Sudder Courts. During the Company's regime the law officers had not only possessed a mastership over Mahomedan law but in some cases attempted to write new treatises thereupon. Moulvy Serajool Huk, one of the law officers of the Nizamut Adawlut, for example, wrote a treatise upon the Discretionary (Punishment), which was along with others consulted by the Nizamut Adawlut in order to enable itself to discover appropriate sentences in necessary cases.²⁰ The provisions of the Mahomedan law were superseded only in cases where the Regulations and Mahomedan law prescribed distinct penalties for the same offence.²¹

Mahomedan law officers like the court pundits performed an important function in judicial administration under the British regime for nearly one hundred years. The Governor-General in Council would accept the recommendation of the Nizamut Adawlut for the appointment to the office of the Kazi-ul-Kozzat of Bengal. In the year 1791, Nejm-ud-deen was appointed from Lucknow. Persons of learning and personality alone were appointed to the office of law officers of the different courts. The office of the Chief Kazi of Bengal was highly paid. The aforesaid Chief Kazi was paid by way of advance Rs. 2,000/- for his journey to Calcutta.²² As regards the qualifications of the law officers, the *darkhasts* praying for the appointment to the said office, as preserved in the record room of the High Court at Calcutta, make an interesting study. The Kazi-ul-Kozzat of Bengal in his petition to the Governor-General in Council, for example, recommended his younger brother for the office of kazi of the city of Azamabad. He said in his petition that reliance could be placed on the candidate's integrity and impartiality, and that he was the "asylum of learning, adorned with the ornaments of literature, and decorated with the gems of legal knowledge". The *futwahs* of the different law officers whether

²⁰ Sundun Shah (prosecutor), vs. Joora Shah and 3 ors. (prisoners) (1805)

²¹ Fyzoollah vs. Deo Rai and Dhun Singh (1813)

²² Proceedings, Council Chamber, 26 August, 1791 : The Cauzy-ul-Cozaat Nejm-ud-deen had been paid his salary from 1st of March, 1791; the sum of Sicca Rupees 2,000 advanced to him on the 4th May, 1791, had been deducted from his pay.

at the Sudder Court or in the Courts of Circuit or in the courts of Magistrates as preserved in the High Court at Calcutta will unmistakably indicate that the law officers had been really men of understanding and learning. When the *futwah* deviated from the orthodox precepts of Mahomedan law as apparently laid down in the texts, they had to explain—and they did it successfully—how in the circumstances such deviation was dictated by the texts of law themselves. They were not removable except for incapacity proved to the satisfaction of the authorities concerned. Their *futwahs* were given in Persian and translated in English for the convenience of the Nizamut Adawlut. The native law officers, Hindu or Mahomedan, as a body, were both learned and respectable, and far above suspicion of corruption.²³

The Nizamut Adawlut, through its law officers, however kept a strict vigilance over the nature of the *futwahs* of the law officers of the courts below. Any deviation from Mussalman law in forming the *futwahs* by the law officers was viewed with censure in the Nizamut Adawlut. The "Register" of the Nizamut Adawlut would draw the attention of the judges of the Courts of Circuit in the matter, who in their turn, would have to receive explanations from their law officers and forward them to the Nizamut Adawlut. The said explanations had, again, to be referred to the law officers of the Sudder Courts whose opinions on the matters were considered by the court itself and steps taken accordingly.

The law officers of the Nizamut Adawlut were to attend three times in each week, at the "Register's" office and peruse referred trials and would, before they left the office, write and attest, on the record, what they considered should have been the *futwa*. The trials were then submitted by the "Register" to the Nizamut Adawlut which would pass the final sentence.

Similarly, law questions were to be referred to the law officers of the lower courts with a written statement of the facts on which the question arose, dated and signed by the judge. The law officer likewise signed and dated his answer on the same paper, or on another firmly annexed to it.²⁴

The Court of Nizamut Adawlut sometimes would not exam-

²³ William H. Morley: *Analytical Digest*, Vol. I, 1850, p. vi

²⁴ Bengal Regulation IX of 1793; Reg. XVI of 1795

ine the evidence in the cases where the opinion of the sessions judge agreed with that of the law officers.²⁵ The respectability of the law officers did not decrease with the gradual supersession of the Mahomedan law by the Regulations. On the contrary, some of them had been vested with full powers of a magistrate and acted as committing officers.²⁶ Their association was continued and *futwabs* complied with²⁷ till the system was abolished in 1864.²⁸ The Hindu and Mahomedan law officers were, also under Regulation III of 1821, referred by the Magistrates for trial of all complaints of abusive language, calumny, inconsiderable assault or affray, and all charges of petty thefts and other cases heretofore referable to the Assistants of the Magistrates.

On reference being made by the lower court judges to the Nizamut Adawlut as to the inconsistency or other irregularity of the *futwabs* submitted by the officers in course of the same cause or on causes of the same type, the Nizamut Adawlut would refrain from giving any opinion adverse to the formally recorded sentence of a law officer upon representations in a letter of reference by the judges of the lower courts which the law officer had no opportunity of meeting. The judges of the respective courts were expected to state in writing to the law officer their objections to their receiving the *futwa* and to forward any reply which might be given by that officer, along with the proceedings of the relevant cause. The Nizamut Adawlut in *Government vs. Joyah Bagdee (1851)* made the above observations in connection with a reference to the above effect made by the sessions judge of 24-Parganas. The Mahomedan law officer of the court of the said sessions judge in his letter of explanation dated the 8th May, 1851, stated that there was no inconsistency in his verbally expressing to the judge during the progress of a case an opinion founded on the evidence then taken and recording a final judgement, at variance with such an opinion, when the case was closed. The Nizamut Adawlut in its Resolution No. 403 dated 12th May, 1851, recorded the following:

25 *Government vs. Dosstum Nusha and 2 Ors. (1851)*

26 *Bowkee Thakoor vs. Birjbeharry Lal (1851)*

27 *Case of Jaun alia Jan Mahomed and Ors. (1859)*

28 Act XI of 1864

"The Court do not think that there is sufficient ground for further proceedings in the matter, above referred to. The Moulvee is an officer of high and independent judicial functions, and the fairness and admissibility of an opinion and futwah, formally delivered by him cannot be questioned excepting on the clearest and most established grounds. It may be well to watch carefully the language and conduct of the Moulvee Ahmud, in any cases in which the sessions judge may sit with him. But if notice of such language and conduct should again at any time appear to be necessary, it should be taken by the sessions judge instantly and publicly, a formal and duly attested record being at once made of the facts which it may be proper to bring under the consideration of this court."

The *bebusta* of the Pundits of the courts was asked for and considered in special cases even in criminal causes.²⁹ They were also referred to for their opinions on the question of the regularity of the procedure. Thus in a case before the Court of Circuit at the City of Benares where a person was charged for the contradiction in evidence produced by him, who pleaded in defence of contradiction that in giving evidence on the first occasion he was not duly sworn in as much as the sacred symbol of the water of the Ganges was not in his hand but on the ground below, the pundit of the Court of Circuit was referred to as to the validity of the oath thus taken and he replied that a deposition given by a person without the sacred symbols in his hands, if duly sworn, was a valid deposition on oath. The prisoner was accordingly sentenced by the Nizamut Adawlut to one year's imprisonment. Such cases, among others, prove the amount of patience shown by the British administrators of justice in a conquered and foreign territory like India.³⁰ Inquiries were made from the pundits in all cases of peculiar customs and habits of the people involved in criminal cases. In the year 1818 a peculiar case happened at Benares. One Bhuwan Singh Boonya, aged 20 years, was charged for having sallied out one night with a sword, and wounded six persons one of whom afterwards died and another

²⁹ Suhkum Lal vs. Rambowrosa (1810)

³⁰ Vakil ot Government vs. Ghunput (1806)

had his hand cut off. The prisoner had been ailing for a long time and his mother one day attached a sword to his person saying, "May Mother Bhawani cure you". The prisoner in a fit of temporary insanity committed the above crime. The judges of the Nizamut Adawlut, in order to do full justice to the cause, enquired of the pundits of the significance of the mother attaching the sword to the person of her son. The Pundits satisfied the judges with the explanation that it was customary for persons who had been ill to keep one or several of 9 substances near their bodies, the origin of which practice owed to a passage of *Dipika*, discovered the pundits, which advised people to propitiate the nine mansions of the heavens from the malign aspect of one of whom men were afflicted with disease and other calamities. The common people, said the Pundits, supposing their diseases to arise from the malign influence of the dragon's head, kept iron near their bodies. The most curious thing of the whole affair is that the court recorded in its published reports the passage of the *shaster* in question.

With the passing of the Indian Penal Code and other codified laws it was thought unnecessary to continue the offices of Hindu and Mahomedan law officers. It was also thought inexpedient that the appointment of Kazi-ool-Cozaat or of City, Town or Pargana Cazees should be made by the Government. The offices of Hindu and Mahomedan law officers were accordingly abolished with effect from the 18th March, 1864.³¹ The Kazi-ool-Coozaat or the other Cazees were not however prevented from performing, when required to do so, any duties or ceremonies prescribed by Mahomedan law. In 1864 twenty-two Regulations and three Acts were still governing the appointment, jurisdiction, conduct and removal of the Mahomedan and Hindu law officers and Cazees in the three Presidencies of Bengal, Bombay and Madras. By Act XI of 1864 the said Regulations and Acts or the relevant parts thereof were repealed. The usage of the Mahomedan community in some parts of India required, however, the presence of Kazis appointed by the government at the celebration of marriages and the performance of certain other rites and ceremonies. The government had therefore again to be enabled to appoint persons to the office

³¹ Act XI of 1864

of Kazi. The government was accordingly empowered, under the Kazi's Act, 1880, to select, if desired by any considerable number of the Mahomedan residents in any local area, one or more fit persons and appoint him or them to be the Kazi or Kazis for such local areas. No judicial or administrative powers were however conferred on any Kazi selected under this Act.

The proceedings of the immediately previous sitting of the Sudder Nizamut were read and approved, thus assuring a correct recording of the business transacted.

Proceedings of the Special Court, for the trial of persons charged with crimes against the State, were to be submitted to the Nizamut Adawlut, whether the sentence was for acquittal or punishment. Such courts were to be guided by any special orders of Government or of the Nizamut Adawlut regarding the place of their meeting, the persons to be tried and other points not provided for by the Regulations. The proceedings of the Nizamut Adawlut on trials for crimes against the State, were to be submitted to the Governor-General in Council, and the sentence would not be executed until the receipt of his orders.³² The Governor-General in Council in time of war, or during the existence of rebellion, was empowered to cause suspension of functions of the ordinary criminal courts, and to establish martial law for the immediate trial of persons owing allegiance to the British Government, who should be found in arms, or in act of rebellion against the State. On conviction by sentence of court martial, the accused persons were liable to immediate punishment of death with forfeiture of property.³³ The Governor-General in Council, however, reserved the power of causing any person charged with the above offence, to be tried by ordinary courts, or, by any Special Court, under Regulation IV of 1799 or Regulation XX of 1803.

The Nizamut Adawlut was authorised to grant remission or mitigation of punishment in all cases where they might deem the *futwa* of the law officers, or sentence of the assembly of Hill Chiefs, held under Regulation I of 1796, unduly severe. But with regard to persons charged with crimes against the State, the proceedings with the sentence were to be submitted, as seen before, for the orders of the Government. The ground of remis-

³² Regulation IV of 1799

³³ Regulation X of 1804

sion or mitigation was to be specified in the proceedings of the court and the discretion was not to be exercised without strong grounds to be recorded at large upon the proceedings.³⁴

Even when the Naib Nazim Mahomed Reza Khan continued in service, the British administration used to supervise his activities regularly. He had to submit proceedings containing the sentences and the dates on which they were passed. Among the records of the Nizamut Adawlut preserved in the High Court at Calcutta, there are copies of letters from the Naib Nazim addressed to the Government explaining the propriety of his *futwah*, the nature of further investigation of causes held at the instance of the Government and the cause of the delay in passing sentences on particular prisoners. Two such letters of the Naib Nazim were dated July 1791, and written in response to the Government's letters dated the same month of July, 1791. The Nizamut Adawlut requested the Government to write to the Naib Nazim to take the necessary steps for a due administration of criminal justice in the Provinces of Bengal, Bihar and Orissa.³⁵

The Nizamut Adawlut in the earlier part of its life took upon itself to some extent the task of the *Nizamut* or Administration proper. The court, for example, on 10th July, 1792, reviewed the situation of persons at the time of their release from jail, after very frequently suffering a long imprisonment. There could be no doubt that many of them would be compelled, for want of immediate support and from the impossibility of getting any immediate employment, to revert to their former malpractices as the only means left to avoid perishing with hunger. This evil, the court was of opinion, would be very essentially remedied by authorising a small pecuniary allowance as would be sufficient for a month's subsistence to be made to every person who should appear to be actually in need of such assistance at the time of his being released, thereby affording those who were well inclined an opportunity of becoming useful members of society. The expense of the Government would be inconsiderable while the most beneficial effects, the court was persuaded,

³⁴ Regulation I of 1796; Regulation VI of 1796

³⁵ Government Letter, Revenue Department, dated Council Chamber, 15 July, 1791; Nizamut Adawlut Letter dated 20 June, 1791

would result from its being incurred; it was agreed therefore that the foregoing remarks be communicated to the Governor-General in Council, with a recommendation that he will be pleased to authorise the several magistrates to pay to all persons who shall be released from the foudary jail after having suffered an imprisonment of six months or upwards, calculating from the date of their sentence, and who shall appear to be in actual need of assistance, a sum sufficient to maintain them for one month. The sum to be paid to each individual was to be regulated by his situation in life, in no case, to exceed five rupees, and in every instance, to be confined as much within that amount as might be consistent with the purpose of the Regulation. It was also agreed that it would be recommended to the Governor-General in Council that a Regulation to the above effect was to be translated and printed. The Government in compliance with the above suggestion passed a Regulation accordingly. Section 25 of Regulation IX of 1793 and Section 4 of Regulation XVI of 1795 and Section 25 of Regulation VI of 1803 served the purpose. Earlier, on 13th July, 1792, a Rule for the guidance of the magistrates was passed by the Governor-General in Council authorising the magistrates to pay Rs. 5/- to a person released from jail in a deserving case.

The proceedings of the Magistrates of the Jaungul Mehals, on charges of neglect in police duties, against landholders had to be transmitted to the Nizamut Adawlut.³⁶ The court was anxious to see law and order established in the Company's realm. In 1807 prisoners were convicted and sentenced to transportation for life for proceeding armed from the territory of the Company into the territory of Begum Sumroo and there committing a robbery, attended with murder. The judges of the Nizamut Adawlut in the official report of the cases adjudged in 1807, remarked that the prisoners were not sentenced to the punishment of murder because that crime had been committed out of the jurisdiction of the Nizamut Adawlut. Later, in 1809, the heinous crimes committed in foreign territories by subjects of the British Government were cognisable with the sanction of the Government by Regulation V of 1809.

The Nizamut might, under Regulation XVI of 1810, authorise

³⁶ Regulation IX of 1793; Regulation VIII of 1805

a reward, not exceeding Rs. 500/- for the capture of a *sirdar*, and Rs. 100/- for each offender. If these rewards appeared insufficient, the Nizamut Adawlut was to report the same for the orders of Government.³⁷ The police of India from the time of the great poet Kalidasa till to-day have failed to earn the confidence of the public.³⁸ The Nizamut Adawlut, too, had been very sceptic about the dependability of the police proceedings. The Court, accordingly, called for an explanation from the Magistrate concerned for the information of the court where the proceedings of the police appeared irregular and warranting examination.³⁹

The court of Nizamut Adawlut, towards the close of its life had gradually transformed itself into a court of law proper, and did not seem concerned with the problems of administration or the safety and tranquillity of the State even when it had been yet under the governance of the Company and not transferred to the imperial Crown. The spirit of the court had been given expression to in cases of the type of *Government vs. Meer Jalal-ooddeen (1851)*. The said case of Meer Jalal-ooddeen resulted in the Nizamut Adawlut in the reversal of a conviction by a sessions judge, under Act XIV of 1849, of an endeavour to stir up sepoys to commit mutinous practices by inflammatory exhortations and incitement contained in an anonymous placard. The evidence was found insufficient, by the Nizamut Adawlut, to prove that the prisoner was a party to the affixing or publishing the placard, if even it was to be decided that incitement by means of an anonymous placard was within the scope of the law in question. For the said reason, Mr. J. R. Colvin, Judge, was of opinion that the guilt of the prisoner had not been established, and directed his release. Among the remarks the following had been recorded by the judge.

"I would observe that the charges on the calendar are insufficiently and incorrectly framed. The mere writing of the paper, with however criminal a mental purpose, would have been no offence under the Act, and the attaching to a tree

³⁷ Proceedings: Sudder Dewanny Adawlut, 10 July, 1792

³⁸ *Abhijnana Sakuntalam*, Act VI

³⁹ Musst. Jaliff-un-Nissa vs. Helaluddeen Khonkar and 3 Ors. (1851)

merely in order that it should be noticed and read by the sepoys, alleged no offence in direct or strictly admissible terms. The charge should have set forth the affixing to the tree with a knowledge of the contents of the paper for the express end of stirring up the sepoys to mutiny or mutinous practices."

The proceedings of the trials held in the political department were not considered by the Nizamut Adawlut as of a judicial character upon which the court could pass orders as a court of revision or appeal. The committing magistrates in such cases were instructed to re-commit the prisoners for regular trial by a judicial court failing which, by circumstances, the prisoners were advised to be disposed of according to the decisions of the Political Department. In *Government vs. Lanoo and 6 others* (1851) the question arose whether the proceedings of a trial held in the Political Department were subject to the revisional jurisdiction of the Nizamut Adawlut. The individual opinions of the several judges were collected and such opinions together with a copy of the resolution of the Nizamut Adawlut made to the above effect were submitted to the proper authorities for necessary action. On the said issue opinions of the judges varied. Sir R. Barlow and Mr. C. Tucker were for, and Messrs. Dick and Colvin against, the alleged jurisdiction of the court. The Nizamut Adawlut as a court of law recorded its resolution to the effect that the Nizamut Adawlut had no jurisdiction in the matter.

The Court while using its discretionary powers used to deliberate considerably over the propriety of such use. When, for example, the question arose whether the Sudder Nizamut Adawlut had the power to sentence one Arradhun Chung to suffer death it scrutinised into the orbit of its own jurisdiction in the matter. "The Court after a mature consideration of the above proceedings (in the case of Arradhun Chung), of the Futwah of the Law Officers to the Court of Circuit, of the opinions of the judges (of the Dacca Court of Circuit), and of the Futwah of their own Law Officers, thought proper to confirm the Letter (from the Dacca Court of Circuit), and to avail themselves of the discretionary power.... and the Law officers to the Nizamut Adawlut having in their Futwah, declared that Govern-

ment were legally vested with power to sentence him (Kishyo Chung) to suffer death should they think proper and no circumstances appearing in his favour to induce the Court to recommend him to the Governor-General in Council as a proper object for mercy Resolved and Ordered that he be punished with death, and that he be accordingly hung by the neck till he was dead."

On the above sitting of the 8th August, 1792, the Governor-General himself and the Commander-in-Chief were present. The British Administration in India even in those early days demanded strict compliance with the Regulations. In the said cause the court observed that the warrant received with the above Letter was not endorsed as required by the 50th article of the Regulations passed on the 3rd December, 1790.

The Nizamut Adawlut exercised great caution in administering discretionary punishment to the individual cases. Pleas of importunity, helplessness, old age, undue influence, mistaken sense of duty, extenuating circumstances, intoxication, insanity, passion, minority, sex, state of physical condition, customs, habits, lawlessness prevailing in the locality and other allied factors, were duly considered by the Nizamut Adawlut in order to discriminate between case and case.⁴⁰

To cite one or more examples to illustrate the sense of moderation and discrimination permeating the decisions of the Nizamut Adawlut. The case of 1805 as cited below was illustrious in that the judges sitting were the two distinguished jurists, namely, H. T. Colebrooke and J. H. Harington. The case was also typical in the sense that it illustrates the state of society prevailing in India in those days and the way in which the criminal justice was administered by the Company's Government.

The prisoner's wife was raped by a number of people and for a number of times. In the circumstances his wife proposed to him to kill her. Upon her second and urgent request, the shame and disgrace which he had long experienced, induced him to put an end to her life.

In support of the prosecution the voluntary confession of the prisoner, before the Magistrate, was read, and proved by several witnesses. The prisoner, Ramkoonwar, charged with the mur-

⁴⁰ Moost. Sebha vs. Moyunoolla; Vakeel of Govt. vs. Perkash and Ors. (1818)

der, of his wife, pleaded "not guilty". Upon the proof of his confession, the law officer of the Court of Circuit pronounced the prisoner liable to suffer death in retaliation (*kisas*). The Judge of Circuit disapproved the *futwah* of his law officer and not disbelieving the circumstances stated in the confession of the prisoner, who appeared to be "wild, ignorant, and artless", he was of opinion that the punishment of the prisoner should not be severe.

The law officers of the Nizamut Adawlut, however, declared retaliation to be barred, in cases where persons were slain at their own request, and that the prisoner was liable to discretionary punishment (*seeasut*). The judges of the Nizamut Adawlut, again, remarked that the bar to a sentence of death, stated by the law officers, was provided against by the law of the Regulation VIII of 1803, Section 16, which declared that "it shall not justify any prisoner convicted of wilful homicide, that he or she, was desired by the party slain to put him or her, to death", but considering the alleviating circumstances of the case, and in particular the distraction of mind under which the act was committed, according to the prisoner's confession, which was the only evidence against him, the court sentenced him, under the discretion allowed by the *futwa*, to imprisonment and hard labour for five years.

The Nizamut Adawlut, while reviewing the cases of prisoners with a view of remitting or mitigating their sentences under Regulation XIV of 1810, thoroughly discussed the law and its jurisdiction in the matter. The minutes of the judgment recorded in September, 1822, show that in order to know of the limits of their jurisdiction Mr. J. T. Shakespear, J., called for the proceedings of the court in cases where mitigation or remission had been ordered since the enactment of Regulation XIV of 1810 and found that on the 18th June, 1812, the Nizamut Adawlut for purpose of remission or mitigation took into consideration the service, where any, rendered to the public by the family of the prisoner and applied to the Government to obtain the remission of his sentence of seven years' imprisonment passed in a case of affray. The said judge further found that, a note affixed to Mr. White's copy of Regulation XIV of 1810 stated that on the 3rd September, 1812, a construction had been given

by the court of the Nizamut Adawlut that it considered itself empowered under Section 3 of the said Regulation, to grant a remission or mitigation for any cause personal to the prisoner, but not for a cause not personal.

The practice of the court in course of years seemed to be at variance with the constructions above cited. With a view to removing this anomaly the said judge Mr. J. T. Shakespear sought the opinions of his brother judges as to how far they were warranted in granting remission or mitigation without the sanction of Government and if doubt existed, whether it would be proper to settle the law by a special enactment for the purpose.

Mr. W. Leycester was of the opinion that under Sections 3 and 4 of the said Regulation, the court could remit or mitigate in all cases duly before them, on sufficient ground assigned, connected also with the evidence on a review of the case, and that cases of meritorious conduct were covered by a later Regulation. Mr. Smith found that the court was in a position to mitigate upon any ground that was judicial, including also the undue severity of punishment, where any. On non-judicial or personal grounds the Government alone was the proper and sole fountain of mercy. Messrs. W. Dorin and W. B. Martin recorded that the said construction of September 3rd. 1812, by Messrs. Fombelle and Burges, if purported under the said Regulation XIV of 1810, appeared to be wrong. They agreed with their brother judges that under the said Regulation the court was given no power to exercise mercy, which was the prerogative of the Government, but only to mitigate punishment on judicial reason assigned for so doing and apparent on the record of the court, and strictly connected with the case and not extraneous. The cases of burglary, in which they had remitted punishment partially, said the judges, were such as on the circumstances appeared to them too harshly dealt with originally. They remitted on a review of the proceedings.

The tolerance of the British people, as a conquering and ruling race, was one of remarkable degree. The Hill people of Bhagalpore and Rajmahal were not to be tried by the Mahomedan law or the British Regulations. When charged with crimes they were to be examined by the Magistrate and com-

mitted or held to bail, when grounds of suspicion justified it, to take their trial before an assembly of Hill Chiefs to be convened for that purpose. The magistrate had to take measures for securing the attendance of the prosecutor and witnesses.⁴¹ The British Magistrate was empowered to hear and decide on petty complaints. If, however, by his decision he failed to satisfy the parties, he was invariably to commit the prisoner who appeared to deserve punishment. The assembly of Hill Chiefs was to be held twice a year or as often as required. The proceedings of these trials had to be transmitted to the Nizamut Adawlut if the sentence adjudged capital punishment, mutilation or imprisonment exceeding 14 years. The Nizamut Adawlut revised the proceedings and confirmed or altered sentences. The Nizamut Adawlut would not adjudge capital punishment unless so sentenced by the assembly of the Hill Chiefs.

No Brahmin in Benares was likewise to be punished with death; but if declared liable to it, was to be sentenced by the Nizamut Adawlut to transportation for life.⁴² Sentences on them for sitting *dhurna* were to be sent to the Nizamut Adawlut and were not to be executed till the Nizamut Adawlut had directed the enforcement, with such mitigation, as might be deemed proper, as to banishment from the Province and forfeiture of claim.⁴³

Many Indian-administered provinces were annexed by or ceded to the British Government on the conclusion of war or peace at the different periods of the nineteenth century. We may attempt to further illustrate the way of handling the judicial administration of the newly annexed territories by the Nizamut Adawlut by reference to a few leading cases on the matter.

The province of Cuttack was conquered from the Raja of Berar, and finally ceded to the British Government on the conclusion of peace in the year 1804. A murder was committed in Cuttack on the very day the province was declared subject to the British laws. Neelkanth Mug Raj, the Raja of the Fort of Hurumpoor, and two others including one Hurree Kanree were charged with murder and the fact of wilful homicide established. The prisoners alleged that they had been ignorant

⁴¹ Ben. Regulation I of 1796

⁴² Ben. Regulation XVI of 1795

⁴³ Ben. Regulation XXI of 1795

of the declaration of the British law being applicable in their territories. It also appeared to the Nizamut Adawlut that in Cuttack, where the murder was committed, habits of lawless violence had prevailed with impunity under the late Government of the Marhattas. The Court, therefore, in consideration of these two factors, and in conformity with the *futwah* of its law officers and the Regulations, passed sentence of death upon the prisoner Hurree Kanree alone. The Court, under the discretion vested in them by the *futwah*, did not sentence the other two prisoners to suffer any punishment. The Nizamut Adawlut, again, having recommended for the prisoner Hurree Kanree pardon by the Government, orders were given for the release of all the three prisoners.⁴⁴

To cite another case. A sentinel in the service of a Marhatta Chief on a pilgrimage to Benares, convicted of a wilful murder in cutting down a man who did not answer to the third challenge, in conformity to a general order to that effect from his superior, was sentenced in conformity to the *futwa*, to suffer death, as required by the Regulations. But considering that the prisoner committed homicide under a mistaken sense of duty, the Nizamut Adawlut deemed him to be a proper object of mercy and recommended to the Government that he should be pardoned and which was done accordingly.⁴⁵

The Nizamut Adawlut, again, in conformity with Section 10, Regulation VIII of 1803, sentenced one Bussawun of the Rajcoomar Tribe, for destroying his infant daughter, to suffer death but under the circumstances of the proclamation, issued to prohibit and put a stop to this barbarous usage, not having been duly published in the locality of occurrence, it was ordered by the court that a translation of the proceedings in the case should be transmitted to the Hon'ble the Vice-President in Council, with a recommendation in consideration of all the circumstances of the case, that the prisoner be pardoned. He accordingly received pardon from the Government and was discharged.⁴⁶

The law also provided that the European subjects of Chandernagore or Chinsurah would be governed by the laws of those

⁴⁴ Mt. Kumodee and Bulbhuder vs. Neelkanth Mug Raj and 2 Ors. (1806)

⁴⁵ Vakil of Government vs. Sheikh Peer Ali (1807)

⁴⁶ Vakeel of Government vs. Bussawun (1810)

settlements rather than by the Mahomedan law if the latter would inflict a more severe punishment.⁴⁷ With a view to ascertaining the French law in such cases, previously to delivering the trial to the Mahomedan law officer for his *futwa*, the Magistrate was required to inform himself and report, to what punishment the prisoners would have been liable, on conviction according to the French law. Thus in the case of *Vakeel of Government (Prosecutor) vs. 1. Pierre Beaufort, 2. Henrie Delaroché, and 3. Charles Auguste Marie Defromond (Prisoners) 1813*, the Magistrate for the settlement of Chandernagore, on requisition, had to state the report of the Commissaire Du Roi on the position of the French Law on the criminality of persons as surviving principal and *temoins* (second) in a fatal duel. In the case in question, the English, French and Mahomedan laws on the subject were considered, and the Magistrate was authorised to commit all the parties to the said fatal duel to take their trial for murder.

The volume of work of the Nizamut Adawlut had been increasing in course of years. Thus in the year 1805 when the court may be said to have been fairly old, the entire numbers of criminal trials, upon which a final sentence was passed by the court of Nizamut Adawlut in the year 1805, amounted to 167, including 581 prisoners; of whom 217 were acquitted and ordered to be discharged, viz., 131 under security for their future good behaviour and 86 without security. The remaining 364 were convicted and sentenced to punishment on several charges.⁴⁸

The lower courts were expected to expedite the transmission of the records when they received petitions of appeal. Any undue delay had to be accounted for by the authorities below.⁴⁹ The Nizamut would communicate to the Governor-General in Council their favourable opinion regarding the judges of circuit or magistrates. The uncommon care and judgment, like undue negligence or irregularity, with which a case might be conducted in the courts below, seldom failed to attract the notice of the Nizamut Adawlut. In deserving cases the court recorded its marked approbation in the paragraphs of remarks and referred

⁴⁷ Clause 4, Section 2, Regulation XVI of 1805

⁴⁸ Page 102 of *The Report of Cases Adjudged in 1805*: General Remark on trials of 1805

⁴⁹ Government vs. Bholanath Chuckerbutty (1851)

the matter to the Government.⁵⁰

The Nizamut Adawlut not only considered the case coming on reference, or in revision on appeal but also regularly examined the abstract statement of prisoners punished without reference to the Nizamut Adawlut at the jail-deliveries held at different stations of the circuit in the provinces. Where required, the court reviewed the individual cases, required the judges to transmit the proceedings of the particular cases together with explanations of the sentences passed. It also directed the Courts of Circuit below, where found necessary, to reopen the cases and take further evidence for the due administration of justice and to submit the proceedings to the Nizamut Adawlut for final orders.⁵¹ The court seems to have proceeded in the matters in the same way of examination whether the causes came in appeal by the prisoners or referred to it by the Courts of Circuit or Sessions. The lower courts had to assign reason for rejecting the defence or alibi of the prisoners or for disbelieving the evidence of his witnesses. The judges were expected to rest their conviction of the prisoners on the evidence on the record and not on their own impressions. The cases had to be satisfactory throughout. Otherwise, the cases would be remanded or the prisoners acquitted.⁵² The Abstract Statement of prisoners punished without reference to the Nizamut Adawlut, containing detailed accounts of the causes, enabled likewise the Nizamut Adawlut to review the causes individually.⁵³

Appeal lay to the Nizamut Adawlut against the decision of the Courts of Circuit and Sessions and not against its own decisions. It was open to the prisoners, however, to submit petitions for a review of the sentences passed by the Nizamut Adawlut.⁵⁴

Appeals in the form of petition lay to the Nizamut Adawlut from the decision of the lower courts at least as far back as 1792 when the said Adawlut was shifted to Fort William from Moor-

⁵⁰ Government vs. Azeez-ool-Rahaman (1851)

⁵¹ Rujeem Bukhsh vs. Yar Mohummud (1811); Vakeel of Government vs. Delas and Mootée (1812)

⁵² Government vs. Sheik Nusseeroola (1851)

⁵³ Rujeem Buksh vs. Yar Mohummud (1811); Vakeel of Government vs. without reference to the Nizamut by Sessions Judge of East Burdwan, for the month of September, 1850

⁵⁴ Government vs. Bhaig Churn Das and 2 Ors. (1851)

shedabad. Petitions were addressed to the Nizamut Adawlut by a large number of prisoners confined in the different jails in the interior alleging corruption and maltreatment. The petition of 42 prisoners, for example, at the Gaol of Chitipur alleged that they had been many years in confinement and that the jail-keeper Hataulah took Sicca Rupees 10,102/- by promising release by the Nabob through his intercession but the matter was put off day by day and the Nabob was discharged from the service, and that the said jail-keeper promised to obtain their release also from the judges of the Sudder Nizamut Adawlut. The petition further alleged that it was not presented to Mr. Champain the judge, the *vakeel* being bribed by the jail-keeper with Rs. 300/-. Yet another petition of 26 prisoners alleged that Rs. 7,800/- and odd were paid to the said Hataulah for the said purpose of obtaining release.

Towards the later stage of its life the Nizamut Adawlut though not a court of record⁵⁵ decided cases, as far as practicable, upon the precedents set in its previous decisions. The illuminating remarks of the Nizamut Adawlut towards the end of the reports of the individual cases facilitated such reference by pointing out in express terms the cogency of the reasoning adopted and the consistency of the decisions arrived at in respective causes at the different periods.⁵⁶ Neither the manuscript records nor the printed reports of Nizamut Adawlut go to establish that the precedents of the Supreme Court at Calcutta had ever been taken as the authority for the decisions of the Sudder Court. The parties were, however, allowed to cite the decisions of the Supreme Court as to the advisability of the process of reasoning. In *Government (prosecutor) versus Henry Edward Murray (1859)*, where two advocates of the Supreme Court Bar had been engaged on the defence side, the case of Thorn was particularly instanced citing that the judges of the Supreme Court in that case stated as one of the grounds of their recommendation, that upwards of 20 years no man had been executed for a crime committed under the influence of intoxication. It was urged therefore, by the defence counsel that as the Nizamut Adawlut, un-

⁵⁵ See *Legal Remembrancer vs. Matilal Ghose and Ors.* (1914) 41 Cal. 173, 206 and 240.

⁵⁶ Section 5 of Act XXXI of 1841; Act XIX of 1848

like the courts of England, was vested by law with the power of mitigating and remitting the punishment which the law awarded when it might seem equitable to do so, it should follow the practice of the law as it prevailed in England rather than its letter and should not record a capital punishment. Then the American and English law and practices were referred to and discussed.⁵⁷ The following passage may be quoted from the judgment showing the practice followed by the Nizamut Adawlut in the matter.

"The power vested in this court by Regulation XIV of 1810, of mitigating the punishment to which prisoners were liable under the law and regulations in force, is not a mere capricious discretion, but one which is governed by well-defined principles, and for which in every instance valid reasons must be assigned. As remarked by our late reputed colleague Mr. J. R. Colvin, in a minute which he drew up in 1851, on the principles by which this Court is guided in inflicting capital punishment, our Regulations (Sec. 75 Regulation IX of 1793, and clause 2, Sec. 10, Regulation VIII of 1803) require proof, in cases of wilful murder of an intention to kill, either evidently or fairly inferrible from the nature and circumstances of the case, and do not recognise in such cases the English doctrine of implied malice. The general practice of the Court has, in consequence, been to limit the extreme penalty of the law to those cases in which there is a clear deliberate intent to kill, thus assimilating very closely to the practice of those American Courts we have noticed above. Provocation, though insufficient to reduce the crime to culpable homicide, has been frequently admitted as a ground of mitigation, and there are cases in which the Agra Court has remitted the penalty of death in consequence of the crime having been committed under the influence of *bhang*, which frequently produces a temporary insanity....

After very anxious consideration of the evidence, however, we have been unable to find any extenuating circumstances in the case.... The crime of the prisoner is clearly cold-

⁵⁷ Government vs. Henry Edward Murray (1859)

blooded, wilful and deliberate murder. The law must therefore take its course."

Petitions for a commutation of sentence had been presented to the Governments of Bengal and India by a near relative of the said prisoner Henry Edward Murray, who charged with, and convicted of, wilful murder of one Muddun Mohun Lalla on the night of the 15th February, 1859, but met with no success. Then a petition for review of judgment was filed. It was pressed upon the court that although there might not exist any legal grounds for a commutation of sentence yet a recommendation to mercy on extra-judicial grounds, such as the youth of the prisoner and the excitement produced by drink, which he evinced shortly before the murder, might be made to the Government without impropriety and would possibly prove successful.

The presiding judges again carefully having gone over the case and given all the material points of it their anxious attention, in order to see whether there was any ground on which, consistently with their duty as judges, they could recommend the Government to exercise its prerogative, expressed their inability to do so. The judges also carefully considered whether Her Majesty's judges in England had ever recommended mercy in like cases and found the result unfavourable to the prisoner. The application for review was, therefore, rejected and directions given to issue the warrant without further delay.

The Nizamut Adawlut in the form of Resolutions passed with reference to the law and procedure that were to be followed by the courts below, used to instruct the judges concerned whose case came to the Sudder Court by reference or by appeal or in the course of the Abstracts. These resolutions were widely read by all the courts below for their future guidance. They referred to the specific pieces of law and also to the precedents set by the Sudder Court in course of its earlier decisions.⁵⁸ The Circular Orders of the Sudder Court purported to serve the same purpose. In cases of doubt whether a particular Circular Order had or had not been superseded as the tenor of a later Circular Order might have appeared to imply the opinions of the whole court was sought for a clear decision. The judges of the

⁵⁸ Government and Anr. vs. Rajshunder Pal and Anr. (1859)

Nizamut Adawlut seem in this way to have been more anxious to establish the supremacy of reason as determined by the whole court rather than to exercise the power of their individual judgment even in cases where they were individually so entitled.⁵⁹

Constructions of the Regulations and Acts were issued by the Nizamut Adawlut and printed in volumes in order to elucidate the law and disseminate its interpretation. Such constructions were arrived at by the Sudder Court as necessitated by the needs of the occasions. On the reference, for example, by the Commissioner of Delhi, dated 23 July, 1836, whether an inhabitant of Lahore, not yet a British territory, having carried away a male child without the knowledge of the parents, who also had been subjects of the same state, and subsequently settled in the Hurriana division of Delhi, a British dominion, and now accused by the parents, could be subjected to the jurisdiction of the British courts, the Nizamut Court in its Construction No. 1043, held that the prisoner was liable to the jurisdiction of the British court of law for the act of his retaining a stolen child within the limits of the Company's territories.

The authority of the Constructions was all the more great in that in a majority of the vital issues of the interpretation of the law both the Calcutta Court and the Western Court of Nizamut were referred to and the constructions published were the unanimous decisions of the said two courts. At the request of the Nizamut Adawlut of the Western Provinces references were laid before the Presidency Court of Nizamut at Calcutta for the conclusion thereon by the latter court.⁶⁰

The Nizamut Adawlut in the eighteenth century sometimes engaged itself, on its own initiative, in criminal administration as a humanitarian institution and issued Circular Orders to be communicated to the Courts of Circuit, sessions and the zillah and city magistrates in order to enable them to do justice in causes not provided by the laws of the land or by the Regulations that were passed by the Company's Government. Thus in 1796 the Nizamut asked for the opinions of the Mahomedan law officers and the pundits on the question of the legality of the practice of castration of slaves. It was informed that the castration

⁵⁹ Government and Anr. vs. Mooktaram Sahoo and Ors. (1859)

⁶⁰ Construction No. 1253

of any person whether a slave or otherwise was held criminal and punishable by the Mahomedan law and that the consent of the party was not allowed to obviate the punishment whose extent was left to be determined by the discretion of the Governor of the country or his representatives. It also learnt that both Mussalman and Hindu law allowed the mastership to be retained even when the slave was made, illegally, a eunuch. The Nizamut availing itself of the opinion of the Mahomedan law officers and the pundits as to the criminality of castration notified to the courts below and the police officers by its Circular Order No. 4 of 1796 that persons should be brought to trial before the Court of Circuit and to exemplary punishment as the law directed in order to discourage and prevent, as much as possible, the cruel and detestable practice of castration.

In the beginning of the British administration of India, the government confined itself to the distribution of the type of justice which aimed at a rough sort of adjudication upon points of issue presenting themselves before the Court rather than the type of justice seasoned by the characteristics that are taken as the offspring of a refined humanity.⁶¹ This was specially true of the administration of justice at the lower level. It has to be remembered, however, that though the judges of the inferior courts were not notable for their knowledge of law, they were rational and men of character. Their deficiency in the knowledge of law was compensated for by their sense of justice, judicial aggressiveness, and strict impartiality. The Sudder Courts, however, had from the date of their establishment been adorned with eminent administrators and scholars as judges. The manuscript records of the Sudder Courts, preserved in the Calcutta High Court, speak for the sagacity of the judges sitting on the Bench. For a due administration of justice, both civil and criminal, they exerted themselves to the maximum extent conceivable. Though the number of appeals in the beginning was not very large the amount of supervisional work done by the Sudder Courts over the proceedings of the courts below was indeed immense.

⁶¹ The Minute of Lord Moira on the Judicial Administration of the Presidency of Fort William, dated 2 October, 1815

THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

AS EARLY as 1770 a statute, that is, 10 Geo. III c. 47, was passed holding the Company's servants, guilty of oppression or other crimes in India, liable to be tried in England. But production of evidence was a very difficult task and the Act was practically inefficacious. On the recommendation of the Committee of Secrecy of the House of Commons, 1773, an Act was passed by Parliament for establishing regulations for the better management of the affairs of the East-India Company, popularly known as the Regulating Act of 1773. This Regulating Act, that is, 13 Geo. III c. 63, while referring to the Charter responsible for the foundation of the Mayor's Court observed that the court in question as constituted failed to satisfy the needs of the Company's Presidency of Fort William in Bengal. The Act therefore provided, among other things, for the establishment of a Supreme Court of Judicature at Fort William in Bengal which by its jurisdiction and learning would solve the difficulties as experienced in giving effect to the 10 Geo. III c. 47, and left unsolved by the operation of the Mayor's Court even under the Charter of 1753.

Accordingly, on March 26, 1774, a Charter of Justice was granted for the establishment of the Supreme Court at Calcutta. The Supreme Court was established on 22nd October, 1774, and began functioning in January, 1775. The Judges of this new court were independent of the authorities at Fort William and appointed by the Crown, and the court was a King's Court. The court was to consist of a Chief Justice and three small judges,¹ and, later on, of a Chief Justice and two small judges.² The judges had to be Barrister-at-Law of England or Ireland of not less than five years' standing. The court was enabled to exercise all civil, criminal, admiralty, and ecclesiastical jurisdiction rendering all His Majesty's subjects liable to its jurisdiction. The

¹ 13 Geo. III, c. 63

² 37 Geo. III, c. 142, s. 1

court was empowered to establish rules of practice and process and to do things necessary to discharge its function. It was to be a Court of Record and Court of Oyer and Terminer and Gaol Delivery for the Town of Calcutta and Factory at Fort William and the Factories subordinate thereto.

The Act of 1773, however, reserved for the Court of King's Bench in England to inquire into, hear and determine any crime, misdemeanour or offence, committed by any of the high officers of the Company, such as Governor, Judge of the Supreme Court and others, or by any other servant of the Company or by any of His Majesty's servants residing in India, against any of His Majesty's subjects, or any of the inhabitants of India. With this end in view the court of the King's Bench was enabled to issue writ of mandamus on judges of the Supreme Court at Calcutta for the examination of witnesses in India and to send the records of such examination to England.³ The court of the King's Bench could likewise require the Governor-General in Council to examine witnesses in India and send the records to England when cause of action involved the Chief Justice and other puisne judges of the Supreme Court at Calcutta.⁴ When the proceedings were by Bill in Parliament concerning any offence, committed against the Regulating Act of 1773, or any other offence committed in India the Chancellor or the Speaker of the House of Parliament could issue warrants for the examination of witnesses in India. Parliament's power of requisition extended even in cases of capital offences, whereas the King's Bench could not order for the examination of witnesses in India when the evidence in question related to some capital offence.⁵

The civil jurisdiction of the Supreme Court extended over all European and British subjects resident in Bengal, Bihar and Orissa, and every other person who, either at the time of bringing the action, or at the time when the cause of action accrued, was employed or was directly or indirectly in the service of the Company or of any other British subjects. In criminal jurisdiction, the Supreme Court was to hold trials by jury. Both the Grand and Petty Jurors were to be British subjects resident in the Town of Calcutta. The Regulating Act as well as the

³ Section 40 of 13 Geo. III c. 63

⁴ Section 41, *ibid.*

⁵ Section 42, *ibid.*

Charter responsible for the establishment and constitution of the Supreme Court did not specify any law for the court to administer in suits involving the Indians.

In certain cases and under certain conditions appeals from the decisions of the Supreme Court lay to the King in Council. In cases of criminal appeal a greater amount of restrictions was imposed.

The Regulating Act of 1773, however, created one difficulty. The Act while aiming at a better administration of Bengal vested the Company's administration in the Province with effect from August 1, 1774, in a Governor-General and four Councillors appointed to serve for five years as the highest executive of the Presidency. At the same time the Act had imposed upon the Supreme Court to be established the task of dealing with oppression in the executive Government. The nature and scope of the respective functions of the Governor-General and Council on the one hand and the Supreme Court on the other could not be clearly defined. The ambiguous and inadequate provisions of the Regulating Act of 1773 and the Charter of Justice of 1774 soon brought the Executive and the Judiciary of the Presidency into conflicts continuing in one form or another for about seven years till a new enactment was made clearly defining their respective spheres of action. According to the provisions of the Regulating Act the Governor-General and Council were given a free hand in the whole civil and military government of the Presidency of Fort William in Bengal. They were authorised to exercise unlimited power as to ordering, management and government of the territorial acquisitions and revenues of the kingdoms of Bengal, Bihar and Orissa. The plenary powers of the preceding President and Council were to be vested under the Act of 1773 in the Governor-General in Council. The Supreme Court on the other hand was given full power and authority to hear and determine all complaints against any of His Majesty's subjects for any crimes, misdemeanours or oppressions committed or to be committed, and also to entertain, hear and determine any suits or actions whatsoever against any of His Majesty's subjects in Bengal, Bihar and Orissa, and any suit, action or complaint against any person who shall at the time when such debt or cause of action or complaint shall

have arisen have been employed by or shall have been directly or indirectly in the service of the Company, or any of His Majesty's subjects. The Regulating Act in this way failed to clearly provide that such and such functions and discretions on the part of the Governor-General and Council were beyond the jurisdiction of the Supreme Court for a judicial review^o of the administrative actions of the executive. The Supreme Court consequently exercised its authority over all persons and in all causes of action irrespective of the social or official position of the persons concerned. Itself being the King's Court and its judges Barrister-at-Law, accustomed to the freedom and independence of the English courts at Westminster, the Supreme Court intervened on complaints being lodged, even in the administrative orders of the Governor-General and Council in so far as they tried to interfere with the functions of the court. But an independent Judiciary was irreconcilable with the "irresponsible" Executive, and the two branches of the Administration soon came into conflict with each other. The nature of the quarrel between the Supreme Council and the Supreme Court has been illustrated in the history of Bengal, Bihar and Orissa by a number of cases, including those of Commal O'Deen, Ranee of Burdwan, Seroop Chand, Dutt vs. Hosea, Council's Record, Bahadur Beg, and Rajah of Cossijurah. This jurisdictional conflict has been illustrated in details in his monograph by Dr. Indu Bhusan Banerjee; *The Supreme Court in Conflict* (1940) and in general terms by the Venerable Firminger in his *Introduction to the Bengal Portion of the Fifth Report, 1812, of the Select Committee*.

The above difficulties persuaded the Parliament to enact in 1781 a declaratory Act (21 Geo. III c. 70) explaining and defining the powers and jurisdictions of the Supreme Court. The Act of 1781 prescribed that disputes involving questions of inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party should be determined by the personal laws and usages of the Hindus and Mahomedans, and that while one of the parties differed in religious persuasion from the other, by the personal laws and usages of the defendants.⁶ It was also enacted that no person

⁶ Section 17 of 13 Geo. III c. 63

would be held to be subject to jurisdiction of the Supreme Court solely on the ground that he was a farmer of revenue or a zamindar.

It was further provided that persons simply because they were in the Company's employ would not be subject to the jurisdiction of the Supreme Court in cases of inheritance and succession. It was further ordained that regard should be paid to the civil and religious usages of the people.⁷ The Act of 1781 indemnified the Governor-General and Council and officers acting under their order and authority in the undue resistance to the process of the Supreme Court and clearly defined the jurisdiction of the Supreme Court and the legislative and administrative powers of the Governor-General and Council. The Act while curtailing the jurisdiction of the Supreme Court granted immunity to the Governor-General and Council. The revenue matters, including its imposition and collection, and the Regulations of the Governor-General and Council were exempted from the jurisdiction of the Supreme Court; only excesses committed in its administration and collection were cognisable by the Court. In 1786, again, the Governor-General was given the power to override the Council, whatever the intensity of the opposition. The chief builder of the empire was in this way enabled to rid of men like Francis in the Council with whom the sanctity of the human soul was a greater consideration than the building of an empire. The provision of the Act of 1775 laying down that a majority of the Council could defeat the Governor-General's policy was repealed by the new Act of 1786 only to facilitate the acquisition, consolidation and preservation of the nascent empire that was being raised at the time.

The Supreme Court enjoying the jurisdiction as a common law, equity, criminal, ecclesiastical and admiralty court, was from the beginning of its functioning fairly busy in its work. In the first seven and a half years of its operation the Supreme Court, replacing the Mayor's Court granting probates of wills and letters of administration to Hindus and Mahomedans by virtue of its jurisdiction, conferred upon the Mayor's Court by clause 69 of the Charter granted to the East-India Company in 1753 by George II, granted more than 200 probates and adminis-

⁷ Section 18, *ibid.*

trations of the wills and effects of the Hindus and Mahomedans. When the Supreme Court was first instituted in Calcutta the Indian section of the public took great pride in the fact that their equity cases, where any, were pending in the Supreme Court. Soon after, the idea changed. The inordinate expenses involved in a suit at the Supreme Court ruined many a distinguished family of Bengal. The late Judge-Pundit Mrityunjay Tarkalankar of the Supreme Court said that the only experience he had gathered in the Supreme Court was that litigation in the Supreme Court meant ruination of the parties. The Europeans, however, took the Supreme Court only as a last resort and tried to settle disputes by arbitration. Indians also began to follow their example. *The Samachar Chandrika*, dated October 31, 1829, was glad to note that the India Gazette had announced that for the new term only five suits had been filed as opposed to more than twenty for the previous term. At the beginning of the last term of 1853 the Court was adjourned because no cause was set down for trial, and that the Barristers-at-Law had been compelled to transfer their services from litigation to philanthropy.⁸ Mr. W. Holloway, in 1853, cited a table of the sums expended by a few families published in one of the Madras newspapers in 1847 showing that the price of obtaining or attempting to obtain Supreme Court justice at Madras was to 37 individuals nearly two millions sterling (exactly, Rs. 19,937, 000/-). Mr. T. L. Strange, puisne judge of the Madras Supreme Court, in his *Letter to the Government of Fort Saint George on Judicial Reform, Madras, 1860*, collected⁹ extracts of views of some knowledgeable persons on the costliness of litigation in the Supreme Courts at the three Presidencies,¹⁰ in order to draw the attention of the Government to the defects of the judicial institutions of the country obtaining at the time.

⁸ W. Holloway: *Notes on Madras Judicial Administration*, Appendix pp. iii and iv

⁹ *Ibid.* Appendix xiv, pp. lxxxiii-xci

¹⁰ Hyde East, 1830; *Evidence before House of Lords*, pp. 78, 81. T. A. Strange, 1830; *Evidence before House of Lords*, p. 261. Courteney Smith, 1830, *Evidence before House of Lords*, p. 62. C. Grant, 1832: *Special Reports of Indian Law Commission*, 1847, p. 49 A.D. Campbell, 1832, *Evidence before House of Commons*, Public, 1517. N. B. Edmonstone, 1832, *Evidence before House of Commons*, Public 1669. R. Palmer, 1833, *Special Reports of Indian*

Fortunately for us, the reports of the Supreme Court cases are extant and cover almost the entire period of its existence. "The great practical value of the publication of the decisions was by the old reporters considered to be that they were calculated to prevent much contrariety of judgment and to produce uniformity of decisions on matters on which a conflict of decisions would be disastrous."¹¹

It may however be said that although the Act of Settlement, 1781, settled the relationship to obtain between the Governor-General in Council on the one hand and the Supreme Court on the other it failed to describe precisely, or the court failed to

Law Commission, 1847, p. 258. R. Comyn, 1833, *Special Reports of Indian Law Commission*, 1847, p. 8. Auckland, 1836, *Special Reports of Indian Law Commission*, 1847, p. 73. A. Ross, 1836, *Special Reports of Indian Law Commission*, 1847, p. 76. T. B. Macaulay, 1836, *Special Reports of Indian Law Commission*, 1847, p. 77. T. B. Macaulay, 1836, *Minutes of Government of India on Indian Act XI of 1836* p. 20. E. Ryan, 1836, *Special Reports of Indian Law Commission*, 1847, p. 47. J. P. Grant, 1836, *Special Reports of Indian Law Commission*, 1847, p. 47. B. H. Malkin, 1836, *Special Reports of Indian Law Commission*, 1847, p. 47. Elliot, 1838, *Debate in House of Commons of Indian Act XI of 1836*, 22 March, 1838. Madras Government, 1838, *Special Reports of Indian Law Commission*, 1847, p. 141. J. W. Hogg, 1838, *Debates in House of Commons on Indian Act XI of 1836*, 22 March, 1838. R. Comyn, 1839, *Special Reports of Indian Law Commission*, 1847, p. 166. A. Amos, 1839, *Special Reports of Indian Law Commission*, 1847, p. 171. E. P. J. Gambier, 1842, *Special Reports of Indian Law Commission*, 1847, p. 195. G. Norton, 1845, *Special Reports of Indian Law Commission*, 1847, pp. 301, 306. E. Perry, 1845, *Special Reports of Indian Law Commission*, 1847, p. 772. Indian Law Commission, 1845: *Special Reports of Indian Law Commission*, 1847, p. 283. T. Sydney Smith, 1845: *Speeches in Madras Supreme Court in Defence of the Master*. W. Burton, 1845, *Address from the Bench of Madras Supreme Court on the Case of the Master*. Madras Athenaeum, 1845, 14 June, 1845: *On the case of the Master*. Madras Record, 17 June, 1845. *Calcutta Friend of India*, 19 June, 1845: *On the case of the Master*. H. Chamier, 1845, *Special Reports of the Indian Law Commission*, 1847, pp. 257, 258. *Special Reports of Indian Law Commission*, 1847, pp. 198, 199. *Special Reports of Indian Law Commission*, 1847, pp. 221-6, 227. J. P. Willoughby, 1853, *Evidence before House of Lords*, 2873, 3050, 3051. F. Millet, 1853, *Evidence before House of Commons*, 1847. E. Perry, 1853: *Evidence before House of Commons*, 2479, 2481, 2483. E. Perry, 1853: *Evidence before House of Lords*, 2732, 2735, 2736, 2743.

¹¹ T. A. Venkasawmy Row: *The Indian Decisions*, (Old Series) Vol. 1, 1911, p. vii

interpret consistently, the jurisdiction of the Supreme Court over persons of Indian origin.

The Reports of the Decisions of the Supreme Court of Judicature reveal that at least as early as January 1776 administration was granted on the estate of a Hindu, though the administration was to follow Hindu law. The court at first doubted and took time to consider whether administration of the goods of a Hindu could at all be granted. Impey, Chief Justice, and Chambers, Judge, thought but Lemaistre and Hyde, Judges, differed, that the administrator would be bound to administer according to the statute of distributions. The court however afterwards determined that the administration of the goods of the Hindus should be granted, and that the administrator would be bound to administer according to the Hindu law and custom.¹² The court, however, refused administration when it would disturb possession taken before the court was established. In the year 1780, again, the court had to decide whether a member of an undivided Hindu family would maintain ejectment against another. The new Act of Settlement, 21 Geo. III c. 70, taking away jurisdiction was allowed to be pleaded by way of plea *puis darrein continuance* in *Rada Govind Sing versus Juggessore Mustabee* (1782) where the Act was purported to be in force as soon as it became known to the court here. Similarly, in *Thomas Burgess versus Doopnarain Surma* (1783), the plaintiff was nonsuited because the jurisdiction was taken away by the said Act of 1781 which was passed intermediately, repealing part of the 14th Section of 13 Geo. III c. 63, and arrived at Calcutta in July, 1782. The new Act enacted the observation of the laws and usages of the Hindus in certain cases and was promulgated in Calcutta in the same month of July, 1782. In consequence of the several changes in the law as wrought by the new Act, new rules of court had to be passed on 21st July, 1782.

In spite of the above decisions the Supreme Court was not certain about its jurisdiction over persons of Hindu and Mahomedan persuasions, though administration was unhesitatingly granted to the estates of Armenians dying in and out of

¹² Parte Commula (1776), cited, Morley; *Analytical Digest*, Vol. I, 1850, p. 383, *In the matter of Commula*.

Calcutta.¹³ Thus in 1791, probate was refused of the will of a Mahomedan in the goods of Hadjee Mustapha. The Court (Chambers, Chief Justice, Hyde and Dunkin, Judges) unanimously refused to grant probate, observing that although in conformity to the practice of the Mayor's Court, probate and administration had been granted in the goods of Hindus and Mahomedans, from the establishment of the Court, till the statute of 21 Geo. III c. 70, arrived at Calcutta, which altered the jurisdiction, of the Supreme Court, the court at that time resolved that the statute was a prohibition of granting probate of the wills of administration of the goods of Hindus and Mahomedans and since that date it had not been done. Notwithstanding this decision of the court, the law was not settled. Thus as late as the year 1832, the same question of jurisdiction had to be mooted threadbare, once again. In *In the goods of Bee-bee Muttra* (1832) the court decided that it had general ecclesiastical jurisdiction within Calcutta and by virtue thereof jurisdiction to grant probates of the wills of the Hindus who left property in Calcutta. Only Mr. Justice Ryan dissented. Because of this uncertainty of jurisdiction the matter had to be fully investigated and considered. In the said case the application was made on the 12th July, 1832, and the Chief Justice Russell delivered his judgement on October 22, 1832. The Returns supplied to the Chief Justice from the office of the Registrar showed that from January 1775 to June 1782, more than 200 probates and administrations of the wills and effects of Hindus and Mahomedans were granted during a period of seven years and a half. Then as to the effects of the Hindus there had been no business up to the year 1816, and as to those of the Mahomedans none till the year 1804. Between 1804 and 1814 the Mahomedans had only 6 probates and administrations granted. During 1814 and 1816 they also had none. Then between 1816 and 1832 the probates and administrations of the effects of the Hindus and the Mahomedans amounted to 230. The jurisdiction was grounded upon the notion that Hindus and Mahomedans when inhabitants of Calcutta might be British subjects within the words of the Charter. According to Chief Justice Russell, the 17th section of the statute of 21 Geo. III, c. 70, made provision for the

¹³ In the Goods of Phanus Johannes (1788)

laws of the Mahomedans and Hindus being preserved to them in cases, amongst others, of inheritance and succession, and did not prohibit the jurisdiction of the court, in respect of probates and administrations over the effects of the Hindus and the Mahomedans. The advantage and convenience of society or inconvenience alone, observed the Chief Justice, could not give jurisdiction to a court of justice. In course of the judgment reference was made to a Paper delivered by Sir E. H. East to the Lords' Committee on East India Affairs. The paper was written about the year 1816 and Sir E. H. East was examined before the said Committee on 9th March, 1830. He observed before the Committee that the Hindus had been permitted to take probates of wills and letters of administration at their own free will, and the documents were not necessary for them in order to give title. The Chief Justice, however, gave as his opinion that though no probate was necessary, it was a conclusive evidence when one granted.

The court as well as the litigant public seem to have all along remained in doubt as to the extent of inhabitancy in Calcutta which might make their persons liable to the jurisdiction of the Supreme Court.

In *David Killican versus Juggernaut Dutt* (1777) the cause of action having accrued in Calcutta, the party was held subject to the jurisdiction of the Supreme Court. It was also decided that persons born in Calcutta were British subjects and that settled inhabitants were not presumed to be foreigners. In the same year 1777 it was also decided that summons might be served on parties, subject to its jurisdiction, while residing in a foreign settlement. In 1778 in *Ramram Dutt vs. Ramnarain* it was held that a bond executed in Calcutta and reciting obligor to be of Calcutta, made him subject to the jurisdiction of the court as to the bond. The clause of subjection to the jurisdiction was not required to follow the precise expressions used in the Act or the Charter but had to be clearly understood and assented to by the obligor. After the promulgation of the Act of 1781, it was decided in *Manickram Chattopadhia vs. Meen Conjeer Ali Khan* (1782) that an inhabitant of Calcutta was not as such a British subject within the meaning either of the 13 Geo. III, c. 63, or the 21 Geo. III, c. 70. Persons born in Bombay

were considered as British subjects and were within the jurisdiction of the Supreme Court.¹⁴

An inhabitant of Moorsshedabad, having a banking house, conducted by an agent in Calcutta, was not within the jurisdiction.¹⁵ Confinement without just cause in the jail of Calcutta would not make the party subject to the jurisdiction.¹⁶ If the defendant had been in jail in Calcutta, evidently, lawfully, he would be considered amenable to the jurisdiction of the Supreme Court.¹⁷

Persons having daily employment in Calcutta but residing out, were not subject to the jurisdiction (1813).¹⁸ But a contrary view was taken in *Heatley vs. MacArthur* (1823). Also, in *Panchanand Bose vs. Davison*, twenty-four hours' residence subjected the visitor to the jurisdiction of the Supreme Court, provided that the plaint was filed when such defendant was in Calcutta. In the case of *Habberley vs. Bason* (1824) the same view was taken. In *Dabeypersaud vs. Benepersaud* (1824) the Court (MacNaghten and Buller, Judges) held that persons residing out of the jurisdiction, but carrying on trade in Calcutta, were subject to the jurisdiction in suits brought against them by persons with whom they had been concerned, or to whom they might have incurred debts, in Calcutta trade. Mr. MacNaghten was further of the opinion that they were not subject to the jurisdiction in suits brought against them by persons who had no dealing with them in the trade which they carried on in Calcutta. Mr. Buller could not agree with the view of his brother judge, Mr. MacNaghten. He held that only inhabitants of Calcutta were subject to the jurisdiction of the Supreme Court in all cases. In the same year of 1824 and by the same judges, that is, Mr. MacNaghten and Mr. Buller, it was held that persons transacting business daily in Calcutta were subject to the Supreme Court. It was in the case of *Martindell vs. Toman*. The defendant was not a British subject and held an indigo factory at Jessore. He would come to Calcutta, transact business in

¹⁴ *Manickchund Tagore vs. W. Johnson; Narain Sing vs. W. Johnson* (1785)

¹⁵ *Oboychurn Doss and Anr. vs. Gunness Doss* (1789)

¹⁶ *Duhan vs. Mendes* (1809)

¹⁷ *Collpersaud Dutt vs. Prankissen Holder* (1830)

¹⁸ *Goculchund Bonnerjee vs. Camdeb Mookerjee* (1831)

the day time, and sleep at Entally for the express purpose of avoiding the jurisdiction. He was nevertheless found subject to the jurisdiction of the Supreme Court. Thus a person having establishment in Calcutta for winding up his affairs was held subject (1830).¹⁹ In *Luckymony Dossee vs. Dhonemony Dossee and others* (1850), it was held that in order to establish constructive inhabitancy by trading, the trade must be continuing at the time and the mere collection of outstanding due to a dissolved firm by an agent appointed for the purpose was not sufficient to establish amenability to jurisdiction of the Supreme Court. But a person residing out of Calcutta but having a shop in Calcutta at which he attended daily, though no person in his employ slept on the premises was considered amenable (1833).²⁰ Again, in 1836, it was decided in *Toomsook Roy vs. Syed Mobarruck Ally Khan Bahadur, Nawab of Moorshedabad*, that the defendant, being possessed of hereditary landed property, and a house in Calcutta, which had never been used as a dwelling house by either the defendant himself or his ancestor, but only a vakeel residing there, his own family residence being at Moorshedabad, was not subject to the jurisdiction.

Contrary to the above decision of Nawab of Moorshedabad case, it was held in 1843 that farming a bazar in Calcutta made a Hindu subject to the jurisdiction of the Supreme Court.²¹ In *William Nash vs. Ranee Surnomoye Dossee* (1851) it was considered that a person who was in possession of a house in Calcutta where he might reside if he chose was an inhabitant of Calcutta and thus subject to the jurisdiction of the court. But, as we have seen, this interpretation of inhabitancy was not strictly followed in the earlier cases.

In *Sunker Doss vs. Manickram* (1843) it was observed by Chief Justice Sir L. Peel that the court was bound by its precedents when a case came before it under an established head of jurisdiction, but would considerably deliberate before introducing a new head of jurisdiction. But the cases of jurisdiction were so much akin to one another that it was difficult for the court to distinguish one from the other which distinction would ab-

¹⁹ Ram Buxus Sing vs. Juggulsett Govind Chand (1830)

²⁰ Juggobundo Bonnerjee vs. Kissenchunder Mookerjee (1832).

²¹ Futtolah Hannah Asphah vs. Sreenauth Mullick (1843)

solve the defendant from or subject him to the jurisdiction of the Supreme Court.

The condition for constructive inhabitancy remained undefined for a considerable period. In 1857 in *Ramloll Mookerjee vs. Sreemutty Burroda Soondery Dabee* the condition was explained. It was held that there must be proprietorship in a constructive inhabitant as well as occupation by some one on his behalf, of the tenement, in respect of which it was sought to make him subject to the jurisdiction.

In determining the laws and usages of the Hindus the opinions of the Pundits of the Court were consulted. The intricate questions of the Hindu law must have perplexed the Supreme Court Judges in the first part of the Supreme Court's life. The printed reports indicate that even before the Act of Settlement was promulgated in Calcutta in July 1782, the Pundits of the Court had to express their views on questions of Hindu law.²² The opinions of the Pundits of the Supreme Court were however not viewed with so much veneration as the opinions of the Mahomedan law officers of the Sudder Nizamut Adawlut. In *Seeblaul Cosinaut and others vs. Punchanaund Agarwallah and others* (1785) the decision of the Supreme Court was contrary to the opinion of the Court Pundit Ramchurn whose views were not found satisfactory. Verbal opinions were obtained from other pundits, none of which were found to agree with the answers of Ramchurn. Answers of Govardhan Cowl, a Cashmerian pundit, afterwards appointed a Pundit of the Court, were considered satisfactory by all the judges and had been fortified by reference to the *Smriti* of Manu. The court sometimes compelled the parties to submit the matter to pundits of their own selection, and would decree on such opinion.²³ In case of difference of opinion among the celebrated pundits the Court desired the opinions of other pundits. In 1786 in *Munnoololl vs. Goper Dutt and others*, Sir William Jones had himself discussed with several pundits and looked into 'Shanscrit' books on the subject in the parts referred to by the pundits. After much search the 'better' opinions of the pundits were accepted.

²² Modun Mohun Corformah vs. Nando Comar Corformah (1780)

²³ Tilluckchund Doss vs. Rasbeharry (1785)

Opinions of pundits were read²⁴ or referred to²⁵ by the parties. When eminent scholars differed, the court would not give judgment then and there, but took time to inquire into the matter. Pundits were also personally interrogated by the court and all sorts of Sanskrit texts were referred to and consulted.²⁶ In *Gunganarain Bonnerjee vs. Bulram Bonnerjee* (1818) the court took the opinions of the Pundits of the Sudder Dewanny Adawlut, the Provincial Court at Calcutta, and the Head Pundit of the College and some other unofficial pundits. The case of *Gourbullub vs. Juggernaut Persaud Mitter and others* (1834) was all the more remarkable in that, Sir Francis MacNaghten, the deciding judge in that case, gave the opinions of fifty-one pundits consulted by him in consequence of a difference of opinion between the Supreme Court Pundits in a case of inheritance by an adopted son.

In doubtful cases the judges of the Supreme Court used to address letters to the judges of the Sudder Dewanny Adawlut requesting answers over the questions of Hindu law. The judges of the Dewanny sent their replies thereto.²⁷ The judges themselves are found to have exhaustively treated the texts of Hindu law.²⁸ Even texts of the *Tantras* were cited by counsel and judges.²⁹

The Supreme Court at Calcutta, unlike the Sudder Dewanny and Nizamut Adawluts, followed as far as practicable the English rules and procedure. The judges of the Mayor's Court though entitled, did not, probably for want of a technical knowledge, rigidly follow the rules and procedures in practice in the courts of law in England. The Supreme Court, however, is found to have been very particular about the English procedure. Thus in 1842 in *Sreemutty Nubbocoomary Dossee versus Goursoonder Seat*, the court held that the rules of evidence to be followed in the Supreme Court had to be the same as at 'Home,' and no allowance was made for the character of the natives. In *Soodasun*

²⁴ Russik Lall Dutt and Anr. vs. Chiton Churn Dutt (1789)

²⁵ Sree Ooday Cower vs. Mohun Lal Bussey (1790-91)

²⁶ Radhamoney Dassi vs. Sri Muti Durga Dassi (1794)

²⁷ Gunganarain Bonnerjee vs. Bulram Bonnerjee (1818); Juggomphan Roy vs. Sreemutty Neemoo Dossee and Ors. (1831)

²⁸ Gooroochurn Doss vs. Goluckmoney Dossee (1843)

²⁹ Govind Doss vs. Ramsahoy Jmadar and Ors. (1843)

Sain vs. Lockenauth Mullick (1839) it seems to have been decided that the Supreme Court would administer English law between Hindu or Mahomedan parties as between British subjects, except only in cases falling within the specific exception in section 18 of statute 21 Geo. III. c. 70.

Occasionally new rules had to be drawn up here for the practice of the Supreme Court at Calcutta in order to raise them to the standard followed in the courts of England. In *Mangles vs. Turton* (1836) rules were followed which expressly said that motions in equity had to be on notice in conformity with the practice of the Court of Chancery in England. The rules had to be revised when deemed necessary. When framed, they were read and passed, and given effect to from a specified date.

Englishmen as defendants are sometimes found to have held the plea of English laws and usages in causes between themselves and the Indians. In 1851 one F. W. Biddle and another person attempted to avail themselves of the usury laws of England as a defence to the action taken by a Hindu (*Issenchunder Chatterjee*) who lent them money at more than 12 per cent. interest. The court held that the usury laws were not applicable to the native lenders. In the same year in *Essen Chunder vs. F.T. Biddle* it was again held that where the borrower was a British subject and the lender an Indian, section 39 of the statute 3 Geo. III c. 63 against usury did not apply, and interest was allowable at the rate on which the parties had agreed.

The Supreme Court at Calcutta with its Westminster leanings, had, when required, recognised the force of usage obtaining in Bengal. Thus in 1842 in *Sibnarain Ghose vs. Russick Chunder Neoghy* it was held that a Bengalee mortgage, even though unaccompanied with possession, gave a lien upon the land. The judges gave also a lucid exposition of the sanctity of usage and immemorial customs. Mr. Seton observed that he always understood that the law of a country was not to be found in the text of its code, which was only the foundation of it, but in the practice followed by the people. Such practice might well be inconsistent with or even in some cases opposed to it. Quoting the last *sloka* of the *Manu Sanhita* the judge remarked that *yucti* (reason and usage) was to be followed and not the letter of the written code. For a solution of the problem whether

mortgages without possession could be recognised, opinions of the Sudder Dewanny were also consulted. Regulation I of 1798 was also found to have fortified the decision arrived at by the Supreme Court. Chief Justice Sir L. Peel concurred, in conformity with the frequent judgments of the court, with the views of Mr. Seton in holding that possession was not essential by the Hindu law to the validity of the contract of pledge.

Mr. Justice Grant, however, dissented. He quoted and considered Sir William Jones, Roman Law, French Lawyers, Law of Holland, Law of the German States, Dutch Civilians, Common Law of England, Hindu Law and Colebrooke, and held a contrary view, namely, that "to ensure the efficacy of a pledge the Hindoo Law inculcates the necessity of possession".

The Supreme Court refrained as far as practicable from interfering in the business of administration of the Company's Government. In 1825 it was held that under section 24 of statute 21 Geo. III c. 70, the court had no jurisdiction to entertain a civil action for false imprisonment against a provincial magistrate, acting in his judicial capacity, however irregular and illegal his act might have been.³⁰ The Supreme Court had no power, it was held, to remove a conviction by a zillah magistrate of a British subject, except under 53 Geo. III, c. 155.³¹ An injunction would, however, issue to restrain proceedings in a mofussil court which had been commenced *pendente lite* in the Supreme Court. An injunction would also issue for the same purpose if a zillah court had jurisdiction over only a portion of the property, when the Supreme Court had jurisdiction over the whole of it. It was however settled that the writ in the case would be directed to the parties and not to the mofussil court.³²

In *Kerry vs. Duff* (1841) Sir E. Ryan, Chief Justice, and Mr. Justice Seton held that the decrees of the mofussil courts were to be regarded as the decrees of the superior tribunals of the country and as of equal authority with the decrees of the Supreme Court itself. Not consistent with this decision, the court three years after, is found to have held that though the Supreme Court would take judicial notice of the practice or modes of

³⁰ *Calder vs. Halket* (1825)

³¹ In the matter of *James Pattie* (1836)

³² *Prawnkissen Mitter and another vs. Muttoo Soondery Dosee* (1841)

procedure of the mofussil courts, the sale of property, for example, by a mofussil court would be treated in the same way as a sale of property by a foreign court.³³ This attitude of the Supreme Court towards the practice or modes of procedure of the mofussil court was given a more definite expression in 1848 in the case of *Muttyloll Seal and Joygopaul Chatterjee and others* where the pendency of another suit in the mofussil between the same parties, in respect of the same subject-matter, was considered not pleadable in bar to a suit in equity side of the Supreme Court, the system and practice of procedure in the two courts being different. According to Mr. Justice Colville, the Supreme Court claimed this right of supersession because the complainant in a mofussil court could not have the same discovery and relief there as in the Supreme Court, as a court of equity, by compelling a full discovery and answer of the defendant on oath. Chief Justice Sir L. Peel justified the encroachment of the Supreme Court in a different way. He observed that a decision of a competent court of jurisdiction between the same parties and relating to the same subject-matter ought not to be reopened, whatever the system of law on which the decision was based. But the pendency of an undetermined suit was a different matter where there was a variance in the mode of procedure, and the Supreme Court, on its equity side, being in a position to afford greater relief in the way explained by Mr. Justice Colville would not be barred by a plea of the pendency of the former proceedings in a mofussil court though the decrees and decisions of such court were given by the Supreme Court the same effect and conclusiveness as the decrees of the Supreme Court itself.

The Sudder Dewanny Adawlut had been given a still higher status. In *Hurropersaud Ghose vs. Ramnarain Mookerjee and others* (1843) it was decided that the proceedings in the Sudder Dewanny were not a breach of an injunction prohibiting proceedings in any mofussil court. The Sudder Dewanny Adawlut did not come, it was considered, within the legal acceptance of a mofussil court.

In criminal causes, for the purpose of jurisdiction, the question of inhabitancy did not arise. In *Janokee Doss appellant vs. The*

³³ Woodubchunder Mullick vs. W. C. Braddon (1844)

King on the prosecution of Binderbun Doss (1836) it was held, upon appeal to the Privy Council, that a person resident at Benares and nowise personally subject to the general jurisdiction of the Supreme Court was subject to the criminal jurisdiction in respect of a conspiracy in Calcutta to which he had been privy though he was never actually within the local limits. The same decision was followed in *In the matter of Sreenauth Roy* (1840).

With this amount of consistency, the Supreme Court, on the discovery at any stage of the proceedings, would rectify its mistake as to the extent of its jurisdiction over persons or property. The proceedings would be dropped and prisoners discharged as the law required.³⁴

The East-India Company had been amenable to the jurisdiction of the Supreme Court. The East-India Company could not deny its jurisdiction to call upon them for an account of the property of a deceased person on the ground of their having dealt with it as sovereigns.³⁵

Executive, on the other hand, had some amount of immunity. In 1775, the first year of its life, the Supreme Court held in *Rex vs. Warren Hastings* that it had no general power to issue writs of *mandamus*. The judges however could not be unanimous. Chief Justice Sir Elijah Impey and Mr. Justice Chambers were for, and Messrs. Lemaistre and Hyde, Judges, against the said ruling. It may be recalled that it was a case coming during the period when the Regulating Act of 1773 had been in force, and the new Act of Settlement of 1781 not enacted. In the intermediate period, namely January, 1775, and July, 1782, a number of factors such as the indefinite provisions of the Act of 1773, the Charter of Justice, the juristic attitude of the Supreme Court Judges, the humanitarian leanings of several Councillors at Fort William, and the aggressive attitude of the champion of the empire in the making, Mr. Warren Hastings, had been responsible for the conflict between the Executive and the Judiciary of the Provinces of Bengal, Bihar and Orissa. Even prior to the promulgation of the Act of 1781 it was decided by the Sup-

³⁴ In re Samuel Valentine Foy (1850); Seton vs. Abrathon (1851)

³⁵ Mohar Rance Essadat Bye Sahib Peishwa vs. The East-India Company (1850)

reme Court in 1781 in *Rex. vs. Ramgobind Mitter and others* that the powers of the justices of the King's Bench of England had been given to the justices of the Supreme Court severally, and they could issue writ of *habeas corpus* as such justices there-of severally but the Supreme Court as a court had not had any such power. The court could not, for example, issue a writ of *habeas corpus ad testificandum* to bring up a prisoner confined by the warrant of the Governor-General in Council under Regulation III of 1818.³⁶ The Governor-General in Council might issue his warrant to arrest and detain, without a regular trial, British subjects within and without the jurisdiction of the Supreme Court, and such warrant was considered a good return to a writ of *habeas corpus*.³⁷

The court had no jurisdiction to issue a writ of *habeas corpus* to natives not being inhabitants of Calcutta.³⁸ An alien prisoner of war could not claim the writ of *habeas corpus* as of right. The English law relating to personal liberty extended, in the most full, to British subjects only. Sir L. Peel, Chief Justice, reviewed the whole position in *In the Matter of the Maharane of Lahore (1848)*. He explained that the English law as to personal liberty prevailed in Calcutta as to all its inhabitants. Beyond the local limits of Calcutta, the English law on this subject was the personal law of British subjects only which they carried with them.

The system of trial by jury was confined in the Supreme Court to criminal causes alone. The Court had no power to summon a jury in civil causes.³⁹

The proceedings of the Supreme Court as preserved in the manuscript records of the High Court at Calcutta seem to indicate that there is no reason to suppose that justice in the court of sessions at Calcutta in those days was not distributed as efficiently as in these days. In one respect, it may be observed that the system then in operation could claim superiority over the one now in vogue in the sessions side of the High Court at Calcutta. In the sessions sittings of

³⁶ *Damodar Doss vs. Huruckhund* (1858)

³⁷ *In re Tucket Roy* (1858)

³⁸ *Rex vs. Goculnauth Mullick* (1824)

³⁹ *Hurrikissen Mistree vs. James Creasy* (1779)

those days generally a number of justices would participate in the day to day business of the court. On occasions full courts are found to have been sitting. Other things remaining equal, a larger number of Justices were expected to do better justice to the causes.

The proceedings of the Sessions of Oyer and Terminer and Gaol Delivery 'holden' in and for the Town of Calcutta and Factory of Fort William in Bengal and Limits thereof and Factories subordinate thereto⁴⁰ show that the Sheriff of Calcutta used to deliver into the court the writs that were returnable on the respective dates. The Justice delivered the charge to Grand Jury and Petty Jury as the cases required. The Jury, too, following the practice of England, had to return the Bills, unanimously, either as true or not true. According to the law of England, again, which was also in consonance with the Mahomedan law operating in India, burglary, larceny, stealing and such other less serious offences were considered as sessions matters along with manslaughter, murder and other such serious offences. The Grand Jury, again, had to labour hard, for a large number of cases had to be considered by them during the course of the day when they were called, sworn and charged. On the 25th October, 1856, they had to consider, for example, as many as 28 cases. Both Indians and Europeans were involved as the accused, and the King or the Queen was the prosecutor or prosecutrix.

The prosecutrix Queen or the prosecutor King engaged attorneys. The defendants, too, engaged them.

During the sessions the court used to sit almost on all the week days.⁴¹ The Grand jury were adjourned from time to time and discharged when the sessions were over.

The court was, here again, anxious to do justice to the causes. Thus when on the 12th November, 1856, in the case of the *Queen vs. Hopein Khan and John Chamier Chater*, it was found that the case took too much time and as justice could not be done without intermission upon the said trial, the court with the consent of counsels for the prosecution and for the prisoners ordered that the Jury empanelled and sworn to try the said issue might

⁴⁰ Records preserved in the Calcutta High Court

⁴¹ Proceedings of the Court, 1856

have leave to withdraw from the Bar of the Court to come the next day at 11 o'clock to finish the trial. The court had a similar observation in the *Queen vs. Tincowry Ghosal* and 4 others on 13th November, 1856. Though one judge was sufficient to form the quorum, sometimes Full Benches were constituted according to the pleasure of the justices or the exigencies of the occasions.⁴²

The members of the jury had to attend the sessions court under compulsion. For absence they had to obtain leave of the court of sessions. They could be exempted from serving on the Jury only with the order of the court.⁴³ Both the Grand and Petty Jurymen were fined for their non-attendance without the necessary leave of absence.⁴⁴

On the functioning of the law and the procedure pertaining to the jurisdiction covered in this Section two or three more observations appear to be relevant.

The legitimate right of the English settlers of being governed by the King's laws and Royal Courts became to some extent the cause of oppression to the people of India finding themselves under control of the foreign government. The European British subjects enjoyed the privilege of exemption from the jurisdiction of the Company's courts. Even when the European magistrate of the district committed the accused to the Supreme Court at Calcutta it was difficult for the prosecutor to adduce sufficient evidence before the Supreme Court which might be deemed adequate for conviction. The immobile country people did not like the idea of going up to Supreme Court for justice against the actions of a British-European subject who wielded enormous influence in the locality in which the aggrieved Indian lived. In the year 1813, British subjects residing, trading, or holding immovable property in the provinces were made amenable to the Company's courts in civil suits brought against them by the Indian people with however a right of appeal to the Supreme Court at Fort William in cases where an appeal otherwise lay to the Sudder Dewanny Adawlut.⁴⁵ In 1836 it was enact-

⁴² Proceedings of the Court, 1856

⁴³ Proceedings of the Court, 1856 and 1857

⁴⁴ Proceedings: Sixth Sessions, 1856, 14 November, 1856; Proceedings: First Sessions, 1857

⁴⁵ Section 107 of 53 Geo., III, c. 155

ed that no person by reason of birth or descent should be exempt from the jurisdiction of the Company's courts.⁴⁶ In justice and fairness, the Government of India in 1849 drafted two Bills, one for trial by jury and the other for abolishing exemption from the jurisdiction of the East-India Company's criminal courts. The opposition of the British community however against those two Bills forced the Government to drop them for the while.

Some of the servants of the East-India Company sent a petition to the Parliament against Grant's proposed Jury Bill.⁴⁷ The European-British subjects also presented a memorial for the repeal of Act XI of 1836 rendering them amenable to the jurisdiction of the civil courts in the mofussil. Some of the witnesses before the Committee of Indian Affairs (1853) as well as the Royal Commission set up to consider the Reform of the Judicial Establishments, Judicial Procedure and the Laws of India suggested for the amalgamation of the Sudder and Supreme Courts. Macaulay's Code, again, intended to supersede the English criminal law and to bring the British under the criminal jurisdiction of the Company's courts.

All these proposed measures had been strenuously opposed by the British inhabitants in India. They sent petitions to the authorities in England against the promulgation of the equalising provisions. In November, 1856, William Theobald, a practising Barrister of the Supreme Court at Calcutta, was deputed by a numerous body of the British and Christian classes of Calcutta and of the Lower Provinces of Bengal to proceed to England:

- (1) to secure a parliamentary opposition to the amalgamation of the Supreme and Sudder Courts;
- (2) to preserve with an unimpaired jurisdiction the Supreme Court as a court of English law;
- (3) to preserve trial by jury of Christians for the British and Christian inhabitants;
- (4) to promote the establishment of English law as administered in the Supreme Court as the *lex loci* of India for all classes of persons and all kinds of interests not governed by special law; and

⁴⁶ Act XI of 1836

⁴⁷ *India Gazette*, January 22, 1833

(5) to promote the prayers and declared principles of the petitions sent to England from Calcutta during the two immediately preceding sessions.⁴⁸

The sons of Bengal, famous for their learning and loyalty,⁴⁹ in opposition to the sectarian activities of the European-British subjects, held, on the other hand, a great public meeting in the Town Hall of Calcutta⁵⁰ on 6 April, 1857, to consider the propriety of supporting so much of a project of law then before the Legislative Council of India as referred to the extension of the criminal jurisdiction of the mofussil courts to all classes of Her Majesty's subjects without respect of religion, race, or place of birth, with Raja Kalee Krishna Bahadoor in the presidential chair. The objectionable features⁵¹ of the judicial administration of the time were discussed, the superior administrative and judicial efficiency of the native agency as opposed to the European-British personnel emphasised and suggestions made for their redemption. Some of the Englishmen, too, it has to be remembered, supported the cause of the Bengali gentlemen.⁵²

In spite of the new Indian Penal Code, the Indian judges and magistrates, prior to 1882, could not try any European or American offender; nor could they enquire into the offence alleged to have been committed by him. Shortly after the Code of Criminal Procedure (Act X of 1882) was passed the question was raised whether the provision of that Code which limited the jurisdiction over European-British subjects outside the Presidency Town to judicial officers who were themselves European-

⁴⁸ William Theobald: *Summary of Statements and Arguments submitted to the Right Honourable the President of the Board of Control and some other Gentlemen*, 1857

⁴⁹ The proceedings of the public meeting of the Bengali Community held on 29 July, 1853, at the Town Hall, Calcutta

⁵⁰ *East India Pamphlets*, Volume (1857-58) (National Library, Calcutta)

⁵¹ Sections 105 and 205 of 53 Geo., III. c. 155; Clause 1 of Section 2 of Bengal and Ben. Regulation II of 1796; Clause 1 of Section 19 of Ceded Provinces Regulation VI of 1803

⁵² Proceedings of the Legislative Council, 7 March, 1857; Marquis Clanricarde: House of Lords, February, 1857

British subjects could not be modified.⁵³ After consulting the local Governments the Government of India had arrived at the conclusion that the time had come for modifying the existing law and removing the existing bar upon the investment of native magistrates in the interior with powers over European-British subjects. The Government of India accordingly decided to settle the question of jurisdiction over European-British subjects in such a way as to remove from the Code of Criminal Procedure, at once and completely, every judicial disqualification as was based merely on race distinction. The Anglo-Indian community, as referred to above, and the Anglo-Indian press, chiefly *The Englishman* and *The Statesman*, started propaganda against the equalising Bill, and a European Defence Association had been formed to agitate the promulgation of the equalising law. The necessary amendment to the Indian Code of Criminal Procedure was proposed by the Government of India and secured the sanction of the authorities in England on 2nd February, 1883. Opinions in favour of the Bill of the eminent judges of the High Courts and professors and administrators could not however prevail against the sentiments expressed in opposition to the Bill.⁵⁴ It had to be provided, therefore, that only those Indian judges and magistrates who would be made Justices of the Peace could wield jurisdiction over the European and American offenders, though the new law did not materialise in its effect. The law was subsequently revised so as to enable the Indian accused to claim to be tried by a majority of his countrymen as jurors just as the European-British subjects could. The European and American citizens could claim the same privilege if a large number of jurors of their own nationality were available. In any case they could claim to be tried by jurors whose majority consisted of white men.

The conflict of interests between the Englishmen and the Indians notwithstanding, the Special Report of the Indian Law Commissioners concerning judicial administration and judicial

⁵³ C. P. Ilbert's statement of Objects and Reasons dated 30 January, 1883

⁵⁴ *Opinions in favour of the Ilbert Bill* being a collection of the recorded opinions of some of the most eminent men in support of that measure together with an appendix containing the favourable opinions of the High Court Judges of Calcutta, Bombay and Madras, 1885

establishments in Bengal, Bombay and Madras, 1844, the assurance given in Parliament for the amalgamation of the Supreme Court and Sudder Courts, the proposals suggested by some of the witnesses before the Committee on Indian Affairs in 1853, the Rules drafted by the Law Commissioners, as appointed on 17 March, 1854, for the proposed amalgamation, and later on the passage of the Code of Civil Procedure in 1859, the Indian Penal Code in 1860 and the Code of Criminal Procedure in 1861, laying down a uniform system of law and procedure for all the courts of the country, prepared the way for the amalgamation of the two Sudder Courts and the Supreme Court into the High Court of Judicature at Fort William in Bengal with effect from 1 July, 1862.⁵⁵ The Chief Justice and the two puisne judges of the Supreme Court became the Chief Justice and two of the twelve puisne judges of the High Court that was established.⁵⁶

⁵⁵ Section 8 of 24 and 25 Vict. c. 104 ⁵⁶ Section 3, *ibid.*

THE COURTS OF CIRCUIT

AS EARLY AS 1773, Warren Hastings in his letter to the Council at Fort William dated July 10 of the same year made some suggestions with a view to reforming the criminal administration of the Provinces. The other Members of the Council supported the proposals of Hastings on August 31, 1773, though all the proposals could not be immediately given effect to. It took a number of years to effect the reforms proposed. In 1787 a new Regulation was passed for a better administration of criminal justice in the Provinces of Bengal, Bihar and Orissa. By virtue of the Regulation of 27 June, 1787, the Company's magistrates were enabled to take cognisance of petty offences, the major and more serious offences being left as the exclusive jurisdiction of the criminal courts of the country working under the Naib Nazim. The appointment, control and removal of the judges and officers of the criminal courts continued to be the privileges of the Naib Nazim. The sentences of the Nizamut Adawlut at Moorshedabad continued to be final and were executed under the superintendence of the Naib Nazim to be reported to the Council at Fort William only after the execution.

It was for Lord Cornwallis to record a serious contemplation of reforms of the criminal administration in 1790.¹ He proposed to reform the Mahomedan criminal law after the lines suggested by Warren Hastings in 1772 and 1773 as well as to change the constitution of the criminal courts. Accordingly, the intention of the criminal in a case of murder was accepted as the determining factor in awarding punishment and not the manner or instrument of perpetration. In this piece of reform authority was ascribed to Yusuf and Mahommed instead of Aboo Haneefa who emphasised the importance of weapon or the manner of murder irrespective of the intention on the part of the

¹ Minute of Lord Cornwallis, 1 Dec., 1790

criminal.² Secondly, the relatives were debarred from pardoning the offender.³ The Government proposed to substitute temporary hard labour, fine or imprisonment for the punishment of amputation of legs and arms and other cruel mutilations authorised by Mahomedan law.⁴ In 1793 it was enacted that the judges be authorised and directed to commute the sentences of mutilation and amputation awarded to the prisoner in conformity to the *fatwa* of Mahomedan law officers. It was enacted that the prisoners had to undergo hard labour for seven years where he was sentenced to the loss of one limb and for fourteen years where to the loss of two limbs. The magistrates had to execute the sentences accordingly.⁵ Prior to the enactment of this new law of 1793 a Resolution of the Governor-General in Council was made to the same effect in 1791. Earlier, dacoits had actually to undergo the punishment of mutilation and amputation. *The Calcutta Chronicle* of February 19, 1789, described, as we have seen, how at Salkia near Calcutta fourteen criminals had to undergo the sentence of mutilation and amputation on February 15 of the same year.

The Regulation of 3 December, 1790, enacted for a better administration of criminal justice in Bengal, Bihar and Orissa, reviewed in its preamble the steps taken by the President and Council at Fort William during the preceding 18 years beginning with Warren Hastings's plan and observed that the preceding regulations and institutions as constituted did not sufficiently succeed in repressing the crimes of robberies, murders and other enormities, and attributed the failure of the administration to the delay in bringing the offenders to punishment, to the law not being duly enforced, and to the defects obtaining in the constitution of the country criminal courts. The Government therefore resolved to vest the superintendence of the administration of criminal justice in the Governor-General in Council with a view to ensuring a prompt and impartial administration of the criminal law throughout the three Provinces of Bengal,

² Article 33 of the Regulation of 3rd December, 1791. This Article, *inter alia*, was preceded by the General Regulations of 1772

³ Article 34, *ibid.*

⁴ Government Resolution, 10 October, 1791

⁵ Regulation IX of 1793

Bihar and Orissa. The Nizamut Adawlut situated at Moorshedabad under the superintendence of an Indian judge subject to the control of the President of the Board, had to be shifted to Calcutta, there to consist of the Governor-General and members of the Supreme Council assisted by the Kazi-ul-Kuzat and two Mooftis. The court now assumed the power hitherto exercised by the Naib Nazim as Superintendent of the Nizamut Adawlut, exposition of the Mahomedan law as amended being entrusted to the above law officers of the court.

For the mofussal, four Courts of Circuit were created for the Divisions of Calcutta, Dacca, Moorshedabad, and Patna, each to be superintended by two covenanted servants of the Company, denominated Judges of the Courts of Circuit, each judge being assisted by a kazi and a moofti. These Courts of Circuit would try serious cases, not triable by the magistrates themselves. Every six months the judges would hold a general jail delivery at the stations of the several magistrates within their respective divisions and report their proceedings for the confirmation, in capital cases, of the Nizamut Adawlut at Calcutta. While one judge was touring on circuit the other would hold jail delivery at the divisional headquarters. The four Courts of Circuit for the Divisions of Calcutta, Dacca, Moorshedabad, and Patna later on in 1793 each consisted of three judges who composed the Provincial Courts of Appeal that were established in the year. Thus the same judges and the same Indian law officers, the same registrars and other officers constituted both the Court of Circuit and the Provincial Court of Appeal for a Division. In 1795 a fifth Court of Circuit was established for the territory of Benares.⁶ In 1803 another Court of Circuit was created for the territories ceded to the Company by the Nawab of Oudh.⁷ The jurisdiction of this sixth Court of Circuit was extended in 1805 to the Provinces wrested from Dowlet Rao Scindeah. In 1806 when adjustments had to be made in the zillah and city jurisdictions the Provinces under the Presidency of Fort William in Bengal were divided in the judicial Divisions of Calcutta, Dacca, Moorshedabad, Patna, Benares and Bareilly, each of which Divisions being placed under one Court of Circuit. In the four cities of Dacca, Moorshedabad, Patna and Benares,

⁶ Regulation V of 1795

⁷ Regulation VII of 1803

jail delivery was held each month; in the 24-Pargunnahs it was held quarterly, and in the zillahs half yearly.

Before the circuit judge arrived at the magistrate's headquarters, the magistrate, by public advertisement, summoned the presence of persons admitted to bail as well as prosecutors and witnesses. The calendar of prisoners prepared at the instance of the magistrate, explained to the Circuit Judge the number of prisoners committed or held to bail, containing a brief statement of each case as well as the names of the prosecutors and prisoners. The magistrate also furnished each individual charge and the necessary documents pertaining thereto. The magistrate produced a second calendar relating to the details accompanied by proceedings in each individual case of prisoners apprehended on charges cognisable by the Court of Circuit but discharged for want of evidence. The Judge of Circuit received a third calendar from the magistrate which kept the records of persons tried for crimes and misdemeanours cognisable by the magistrate and his assistants. This third calendar contained the nature of each case determined and the punishment awarded therefor.

In 1793 in each Division there would be simultaneously two Courts of Circuit holding jail deliveries, one consisting of the first judge accompanied by the registrar and the moofiti, the other of the second and the third judge of the Provincial Court of Appeal likewise aided by an assistant and a kazi. This absorption of Provincial Courts of Appeal Judges in the Courts of Circuit business created one difficulty in that the regular business of the Provincial Courts of Appeal was accumulating in arrears awaiting their determination by the court. In 1794 it was ordered therefore that only two of the Provincial Court of Appeal Judges would be holding the two Courts of Circuit within the Division while the third in rotation would be staying at the headquarters to carry out the day to day business of the Provincial Court of Appeal. But even then one judge was no match for the pressure of business at the appellate Provincial Dewanny Adawlut of the Division. In 1797 it was provided therefore that only one of the two junior judges should go on circuit, thus leaving two judges, including the senior judge, at the headquarters for executing the business of the Provincial

Dewanny Adawluts. This arrangement underwent a little modification in 1806 when it was ordained that the senior judge of the Provincial Dewanny Adawlut of Appeal like his brethren was also liable in rotation to go on circuit.

Regarding the volume of work rendered by these Courts of Circuit we have statistics furnished by the judges of the Courts of Circuit in answer to the interrogatories circulated by Lord Wellesley on 29 October, 1801. The speed of despatch of business for the Circuit Judge can be calculated for many sessions as to have been, on an average, at the rate of more than four sessions trials sitting in judgment over more than ten persons on each of the week days of the session.

The Reports of the judges addressed to the Registrar to the Nizamut Adawlut also show that this excessive pressure of work upon the Circuit Court judges had other difficulties for the litigating public. The accused had to pass several months in prison-house before his jail deliveries could begin. Some of the prisoners as undertrials managed to escape from prison. Some of them died of illness while in detention. Sometimes the work accumulated was found to be very oppressive for the judge working on circuit, and the district headquarters where the session was usually held would be crowded with numerous witnesses and prosecutors in addition to the prisoners awaiting trial.

The peasant folks had been kept away from their houses when the season of cultivation had far advanced. On the strength of the manuscript records as preserved in the High Court at Calcutta, we learn that on the 1st day of January, 1799, the 36 lower courts had each on an average 3,540 cases pending for their disposal.

The Indian law officers, namely, seristadars and peshcars, because of their undue influence over the magistrate and in the matter of preparing the serial order of the cases to be heard, were found in spite of their poor pay to have possessed great landed property in the districts.

The wide prevalence of perjury in the courts of law vitiated the purity of decisions arrived at. Mahomedan law prescribed corporal punishment, imprisonment and public disgrace with the authority of discretion vested in the magistrates in awarding

the punishment. The Governor-General in Council in 1797 in order to improve the situation empowered the Courts of Circuit to order inscription of the words *derogh go* (perjurer) or similar other words on the forehead of the prisoner convicted of wilful and corrupt perjury.⁸ Ten years after, it was ordained that stricter rules had to be observed for the infliction of the above punishment⁹ and it took a little more than fifty years for its ultimate abolition.¹⁰

The magistrate had to submit to the Nizamut Adawlut no less than 76 reports in the year, of whom 6 were to be submitted monthly, two half yearly and two in the month of January. The reports dealt with all the distinct stages of the criminal administration of the time.

Colebrooke's *Digest of the Regulations and Laws Enacted by the Governor-General in Council for civil Government of the Territories under the Presidency of Bengal and An Elementary Analysis of the Laws and Regulations Enacted by the Governor-General in Council at Fort William in Bengal* of Harington, indicate that in the first decade of the nineteenth century the Courts of Circuit were to refer to the Nizamut Adawlut about fifty kinds of cases concerning criminal trials. In the year 1825 some small changes took place. The inferior criminal courts were allowed a greater extent of jurisdiction,¹¹ and the law considerably restricted the number of cases where reference to the Nizamut Adawlut was enjoined as necessary.

The judges of the Courts of Circuit inspected the magisterial proceedings in cases of persons confined under requisition of security for good behaviour.¹² These security prisoners were sometimes interned in the regular jails for a considerable period without any justificatory cause. Regulation XXII of 1793 empowering the magistrates to imprison the suspect had been much abused. The Circuit Judge on an inspection of the relevant records set free the prisoners who could not, by the strict observance of Section 10 of Regulation XXII of 1793, have been so imprisoned. In case of detention, which was im-

⁸ Section 3 of Regulation XVII of 1797

⁹ Regulation II of 1807

¹¹ Section 7 of Regulation XII of 1825

¹² Regulation IX of 1807

¹⁰ Section 2 of Act II of 1849

prisonment for all practical purposes, where the prisoner failed to obtain a release on bail where he was so entitled because of his inability to satisfy the court's demand for an excessive bail, the Court of Circuit Judge reviewed the individual situation and directed the magistrate concerned to take such steps as were deemed necessary. The Circuit Judge also drew the attention of the magistrate to other inconveniences. Thus the system which required the attestation of three-fourths of the villagers to the character certificates of an accused and insisted on the presence in the court of all these signatories at the time of trial, was vehemently opposed by the Judge, and ultimately it had to be abolished. Persons detained for not having complied with the unauthorised directives of the court were ordered released by Courts of Circuit. It will not be sufficient, however, merely to multiply the instances, of the type cited, to give a correct picture of the work done by the Courts of Circuit as courts of revision over the city and zillah courts. The nature of the revisional powers of the Courts of Circuit can be better appreciated by our having an idea of the attitude of the revisional courts while reviewing the magisterial proceedings. In doubtful cases of law and procedure the Circuit Judge reserved the judgment concerning a prisoner where some sort of irregularities rendered reference to the Sudder Nizamut Adawlut at Calcutta imperative. Let us cite some leading case. In *Vakeel of Government versus Hurry Nye* the prisoner being charged with the offence of contumacy Mr. E. Watson, Judge of Circuit, drew the attention of Mr. W. C. Blaquiere, magistrate of the 24-Parganas, to the irregularity of the magistrate's proceedings in the arrest of the accused and referred the case to the Sudder Nizamut Adawlut.¹³

The facts of the case were briefly this. One Hurry Nye was brought before the Court of Circuit for contumacy under Regulation IX of 1808. Section 3 of the said Regulation required that the proclamation for the prisoner's appearance had to be issued by affixing it at the magistrate's court, at the different police thannas, and announcement to that effect was also to be made by beat of drum at the places where the thannas were

¹³ E. Watson's Report to W. C. Blaquiere, dated, Allypore, 11 September, 1810, Fifth Report, 1812

situated. Copies of proclamation had to be sent to magistrates of the other districts where the absconder might be presumed to have hidden himself. In the case of Hurry Nye, however, the provisions of Section 3 of the Regulation IX of 1808 were not given effect to by the magistrate concerned. The accused's abode was known to the police officers and still the proclamation by notice or by beat of drum was not made. The sanction for non-appearance of the accused having been highly penal, the Judge insisted on a strict compliance with the provision of the Regulation. Inasmuch as the punishment of Hurry Nye could extend up to imprisonment for life, the judge held that the publication of the proclamation was not a matter of mere form. The provision of a highly penal Regulation should have been strictly and literally observed. Hurry Nye having not been given the benefit of the Regulation could not be condemned, it was held, by the Circuit Judge, and the case was referred to the Sudder Nizamut Adawlut for final opinion.

There were other instances of a judicial review of the judicial-cum-administrative actions. In those days conviction of heinous crimes, especially robbery and murder, depended mostly on confession of the criminals. The instinct of self-preservation inherent to the society tolerated the method which extorted the confession from the criminal.¹⁴ The English judges with their judicial outlook could not entertain with favour the idea of extorting confession from the criminal and this judicial outlook of the Company's judges seems all the more remarkable as we remember that when the East-India Company were settling themselves in the various parts of India during the 17th and 18th centuries the continental countries of Europe were still following the inquisitorial procedure involving the use of torture upon the prisoner for eliciting confession.¹⁵ Though from before the beginning of the seventeenth century England was getting rid of the inquisitorial procedure as a result of the victory of the common law in the judicial administration of the country, the memory of the inquisitorial procedure was still

¹⁴ *Notes on the Early Administration of the District of Midnapur*, pp. 21, 25, 28

¹⁵ Esmein: *History of Continental Criminal Procedure* (Continental Legal History Series), pp. 322-32

lingering in her mind,¹⁶ and the elimination of torture from criminal procedure was effected and the rule of law established only after Coke's influence was exercised in favour of the supremacy of the common law by the insistence on it in his later life.¹⁷ Even against this background of the existing state of things in India as well as in Europe, the judges always suggested better preventive methods in the form of a larger establishment of police functionaries. The system of informers, intriguers, and goyendas, though useful in the eyes of the administrators, was viewed with disfavour by the judiciary even in those early days of British rule in Bengal, Bihar, and Orissa. While making trenchant criticism of the practice of extorting and fabricating confessions resorted to in the mofussal, the Judges directed the magistrates to strictly observe the various orders of the Government, prohibiting the extortion of confession and introducing checks and restrictions as might prevent the malpractice as far as practicable. The learned Judge, in one case, quoted in his report addressed to the magistrate, the law governing the recording of confessions and their admissibility. The law required, among other things, that where a prisoner could read and write the confession was invariably to be recorded in his own handwriting and not in that of any other person. The confession, again, had to be witnessed by one or more persons who had to sign their names and were not men to be influenced by the police, the paper to which the original signatures might be affixed was to be sent to the magistrate and no other copy than the original could be regarded admissible as evidence. The darogah of the police had to state the date and hour when the confession was recorded and witnessed by the independent persons. The Court of Circuit would not tolerate any irregularity in the matter.

The juridicity of the above observation of the Judges of Circuit in the matter of confession can be best appreciated by us in these days when we go through the parallel observations of their Lordships in the Judicial Committee of Her Majesty's Privy Council in a recent case known as *Nazir Ahmad vs. the King*.

¹⁶ Holdsworth: *History of English Law*, V, 185

¹⁷ Holdsworth: *Some Makers of English Law*, 1938, 131

Emperor.¹⁸ It was the P. C. Appeal No. 11 of 1936 from a judgment of the High Court of Lahore, dated 10th October, 1935, affirming a judgment of the Additional Sessions Judge at Lyallpur, dated 16th April, 1935. The appellant was charged with and convicted of dacoity with murder. The Additional Sessions Judge sentenced him to death acting on the admission of a confessional statement alleged to have been made by the appellant before the magistrate who could not record the statement in accordance with the procedure laid down in Sections 164 and 364 of the Indian Criminal Procedure Code, 1898. The magistrate submitted at the time of trial before the Additional Sessions Judge as a document a memorandum dictated to the typist by the magistrate reading from the rough notes the magistrate had made from the confessional statements of the appellant made by the latter at the time of enquiry on the spot of the commission of the crime; the magistrate certified as to the voluntariness of the statement of confession and also himself signed the document. He also gave oral evidence of the confession. On appeal, the High Court of Lahore upheld both the conviction and the sentence observing that the magistrate's oral evidence before the Sessions Court made good the deficiency caused by the confessions having not been recorded under section 164 of Act V of 1898, because in the opinion of the Lahore High Court such evidence was admissible. The appellant's fate depended upon the solution of the sole question whether such evidence was or was not admissible. The application of the appellant addressed to the Privy Council for granting special leave to appeal *in forma pauperis* was granted on the ground of an unsettled state of law obtaining in India as enunciated by the different High Courts of judicature in British India. The Privy Council advised His Majesty to allow the appeal and set aside the conviction of the appellant on the sole ground that where power was given to do a certain thing in a certain way, the thing must be done in that way, or not at all. That is, non-compliance with the provisions of Section 164 of the Criminal Procedure Code on the part of the magistrate led to the acquittal of the accused. The observations of the Judicial Committee of His Majesty's Privy Council sitting in 1936 have had their

¹⁸ 17 Lahore 629 P. C.; A. I. R. 1936 P. C. 253 (2)

parallel, it will be noted, in the remarks made by the Judge of Circuit, Mr. E. Watson, while reviewing the criminal proceedings in the court of the magistrate, 24-Parganas, Mr. W. C. Blaqueire, after the Circuit Judge completed the second session of jail delivery at Allypur on 11 September, 1810.¹⁹

Some of the Circuit Judges, again, were able enough to follow in the footsteps of the Nizamut Adawlut in the matter of catching the spirit of justice and disposing of the causes accordingly. The case of *Vakeel of Government (Prosecutor) vs. Nunnah, aged 18 years (prisoner)*, decided in the Nizamut Adawlut in 1817, will be an instructive reading. The prisoner was charged with wilfully striking his wife, who was 14 years old with a sword and thereby cutting off her left hand at the wrist.

On the trial the prisoner's wife came forward to present a *razeenamah*. On being informed that it could not be admitted, and that the trial must proceed, she earnestly entreated the judge to intercede on behalf of her husband, whom, she declared, she wilfully forgave for any injury she might have suffered and stated that, in the event of his imprisonment, she, being destitute of all relations or friends to receive her, would be reduced to want and misery.

The *futwa*, of the Court of Circuit, zillah Bundalcund, convicted the prisoner, on strong presumption of cutting off his wife's hand under the impulse of anger, but declared that the injured person having pardoned the offender her claims against the prisoner were annulled, it remaining at the discretion of the ruling power to pardon the criminal.

On reference of the case to the Nizamut Adawlut the Judge of Circuit, J. B. Elliot, in recommending the prisoner the mercy, remarked: "I am sufficiently acquainted with the principles of criminal law to know that punishment is inflicted not for the gratification of the passions of individuals, but for the reformation of offenders and as an example to others, and I have also frequently had cause to regret the barbarous conduct of the natives towards their relatives; nevertheless, taking into consideration the peculiar circumstances of the case, the youth of the offender, the tender and unprotected years of the party injured,

¹⁹ Reports of Judges of Circuit on Termination of their Sessions; Fifth Report, 1812, Appendix No. 11

her earnest and unfeigned intercession for his forgiveness and having some doubts also whether a similar case (if such one could have existed) would, without the consent of the woman, have been brought into an English Court of Justice, I am induced to solicit that the Court will be pleased to issue orders for the pardon of the prisoner."

The law officers of the Nizamut Adawlut convicted the prisoner of the offence charged, but declared him unconditionally released from every penalty in consequence of the injured party withdrawing her claim.

The Nizamut Adawlut on consideration of all the circumstances of the case acquiesced in their *futwa* and directed that the prisoner should be immediately discharged, with an admonition that he should be careful not to be guilty of a similar offence, the repetition of which would subject him to severe punishment.

The judges of the courts below were permitted to address the Nizamut Adawlut even after a final decision of the Nizamut Adawlut had been passed quashing their decisions.

The following letter of the sessions judge of Tipperah to the 'Register' to the Nizamut Adawlut No. 355 dated the 3rd October, 1851, will illustrate the attitude of the sessions judge and of the Nizamut Adawlut showing the spirit of co-operation prevailing among the different organs of the judicial system of the period. The judge's letter said: "I trust I may be permitted to explain, first, that I have always understood it to be a fundamental principle of law that a man committing an illegal act is legally answerable for the consequential damages and that, on the ground, Jaffer Ali was held guilty of culpable homicide. Secondly that this principle is fully recognised by the judges in England, as the annexed extract (Extract from the Report of a Trial held on the Oxford Circuit, August 2, 1851) from the report of a recent trial will show. Thirdly, that had I tried the prisoner with the aid of a moulvie, under Mahomedan law, as the law current authorises me to do, the conviction must, I am advised, have been that which was had before me.

"Under these circumstances, though my decision has been quashed, the court will, I trust, perceive that it was not one at which I arrived without due consideration."

The 'Register' of the Nizamut Adawlut in his letter No. 1106 dated 10th October, 1851, informed the sessions judge that the court had directed him to state that the principle to which he referred, and the precedent which he cited, were not applicable to the case in question.²⁰

In 1829, Commissioners of Circuit were appointed with the same powers as Judges of Circuit to hold gaol deliveries twice a year, to perform all duties theretofore discharged by the Superintendent of Police, and to be under the authority of the Nizamut Adawlut. The Courts of Circuit were at the same time abolished.²¹

The Indian officers were invested with an extended jurisdiction in criminal matters in 1831 when it was declared that the magistrate might refer any criminal case to a Sudder Ameen or a Principal Sudder Ameen for investigation though they were not authorised to make any commitment.²² In the same year the zillah and city judges, not being magistrates, were empowered to conduct the duties of the sessions, to try commitments made by the magistrates, and to hold monthly gaol deliveries and to pass sentence or to refer the trials to the Nizamut Adawlut under the same rules as were applicable to the Commissioners of Circuit. But they were not to interfere with the management of the police and all appeals from the orders of the magistrates lay to the Commissioners of Circuit.²³

In 1832 the Principal Sudder Ameen, Sudder Ameen and law officers were authorised to sentence persons convicted of theft to labour in addition to corporal punishment and imprisonment.²⁴

In 1835 it was enacted that all or any part of the duties and powers of Commissioners of Circuit might be transferred by the Governors of Bengal and Agra respectively to the Sessions Judges.²⁵

While under this Section, we may reasonably look to the nature of the jail administration of those days. During the Company's rule the authorities were mainly concerned with pri-

20 Allabuksh vs. Jaffer Ali, 1851

21 Regulation I of 1829

22 Section 18 of Regulation V of 1831

23 Regulation VII of 1831

24 Section 3 of Regulation II of 1832

25 Act VII of 1835

son discipline and sanitary conditions. It was only in the late thirties of the nineteenth century that the Prison Reform Committee of 1836-38 was formed with Lord Macaulay as a member to inquire into the administration of criminal justice as the subject of regular investigation.

From the anonymous but printed *Notes on the Early Administration of the District of Midnapur*²⁶ we get the following account of the jail establishment in one of the leading districts of the three Provinces:

1 Mirda and malconnah (storekeeper)	@ Rs. 25/- per month
30 Burkundazes	@ Rs. 3/- per month
1 Tabeeb (doctor)	@ Rs. 20/- per month
1 Tazeeanabardar (flogger)	@ Rs. 4/- per month
1 Jullaude (hangman)	@ Rs. 4/- per month
1 Gorekand (grave digger)	@ Rs. 4/- per month

Convicts received diet allowances at three-fourths of an anna a day. The nature of the above establishment describes the orbit of the prison administration of the time.

In the Provinces of Bengal, Bihar and Orissa the jails were originally housed in private buildings and thatched houses hired or appropriated for the purpose and situated near the courts guarded by the sepoys under the direction and control of the magistrate. In Midnapore, half the fort was used as a jail.²⁷ The jail of Bareilly was also a *pukka* building.²⁸ When the Select Committee was writing its Fifth Report in 1812, prison-houses had been erected with a scheme of separating the debtor prisoners from the ordinary criminals, the undertrials from the convicts, and women from men. The European surgeon of the district with the assistance of an Indian physician administered medical aid to the prisoners. The Judge of Circuit, again, had to inspect the prisons in person and to see whe-

²⁶ For other districts of Bengal, Bihar and Orissa, the jail establishment had been the same, for which see Colebrooke : *Digest of Regulations*, pp. 138, 146

²⁷ Answers dated 30 January, 1802, of H. Strachey, Judge Magistrate of Midnapore, to the Interrogatories of Lord Wellesley.

²⁸ Report to S. T. Goad, 'Register' to the Nizamut Adawlut, from H. Strachey, 3rd Judge, No. 2 Bareilly Division, 1805, dated 25 January, 1805

ther the jail manual of those days was strictly abided by and to submit his reports to the Nizamut Adawlut at Calcutta. In those days prevention of prisoners from escape from the jails was the primary concern of the prison authorities.²⁹ The considerations now governing the conduct of the jails of these days were not seriously taken into account in the early days of the Company's rule. It cannot be, however, asserted that the question of reformation of the criminals did not raise itself at all. For, the report of Mr. Pattle, Judge of the Court of Circuit and Appeal for Moorshedabad Division, for example, in its answer to question No. 21 of Lord Wellesley's Interrogatories of 1801, alluded to reformation as one of the chief aims of the prison-houses. A survey was made by H. Strachey of the jail accommodations throughout the territories of the East-India Company.³⁰ Later, we got a regular investigation into the matter. The Prison Reform Committee of 1836-38 with Lord Macaulay as a member enquired, as noted before, into the administration of criminal justice. The other important investigations were made in 1864, 1877 and 1888-9. The most thorough and comprehensive enquiry was that carried out by the Indian Jails Committee of 1919-20.

During the early period of the Company's rule lawlessness increased in spite of the judicial reforms that had been made. The terror of the dacoits increased especially in the Lower Provinces of Bengal. The Company's Administration disbanded the native police without at the same time being able to substitute an efficient organisation. Mr. Pattle in his report dated January 1802 in answer to question No. 20 of the Interrogatories of Lord Wellesley of 1801 recorded that only 10 or 15 armed men had the police jurisdiction over an area of about 400 square miles. The Judges of the Court of Circuit and Appeal at Moorshedabad drew the attention of the Sudder Nizamut Adawlut in their report dated 17th August 1799 to the inadequacy of the police personnel.

The financial consideration of the Company prevented any

²⁹ Report of Judge of Calcutta Court of Circuit, 2nd Session, dated 24 March, 1803

³⁰ Report of H. Strachey, 3rd Judge, No. 2 Bareilly Division, 1805, River Ganges, 25 January, 1805, to S. T. Goad, 'Register' to the Nizamut Adawlut

expansion of the police force. The result was that well down in the first quarter of the nineteenth century the commission of robberies, murder and other atrocious crimes continued unabated throughout the districts of Bengal.³¹ The zamindars under the Nawab had stronger police establishments for the preservation of the peace and tranquillity in the territories under their jurisdiction than it was possible for the Company's Administration to achieve in the later years when the Company divested the zamindars of their police function and assumed it in its own hands. The Zamindar of Burdwan, for example, according to the letter of an English magistrate of the District of Burdwan, dated October 12, 1788,³² kept 19,000 civil pykes in addition to an army of 2,400 armed pykes who would assist the thannadars — the chiefs of the police divisions — in their maintaining law and order within his zamindary which spread over 3,280 square miles. The whole of this zamindary, because of the good government there, was found by the Company's agents to have been in the highest state of cultivation and populated by a healthy race of people. The whole of the 19,000 pykes were disbanded in compliance with the new police regulations, and their lands, allowed them in lieu of pay, resumed.

The Company's Government tried to meet the situation of increasing terrorism and dacoity by collective penalisation. Under this system, the co-villagers of dacoit, though themselves law-abiding, had to be fined according to the seriousness of the crime and according to their individual substance. The family of the criminal were rendered slaves of the State. The criminal on conviction had to be carried to his native village and executed there to serve as an example of punishment for the others.³³ The imposition of these iniquitous propositions had been resorted to because of the necessity of the time.³⁴ It took several years thereafter to bring the situation under control. Mere courts of law could not help much. The people of the country were terribly afraid of the dacoits to

³¹ The Governor-General's letter to the Court of Directors, May 29, 1810

³² Fifth Report, 1812, Firminger's edition, 1917, Vol. I, 129

³³ Rule 35 of Hastings's Plan of 15 August, 1772

³⁴ Letter from the Committee of Circuit to the Council at Calcutta, 15 August, 1772

lodge information before the magistrate about their whereabouts. The robbers were very vindictive and would take personal revenge upon the informants if somehow they could escape the gallows.³⁵ In course of time the institution of professional goyendas with the chances of the abuse of such an institution,³⁶ a reformed police system, and an abler magistrature; construction of a network of better roads, modern means of communication; humanising influences of education; greater density of population, growth of a greater civic sense among the people; a general deterioration in the vigour of men endowed with criminal propensities, better chances of employment; and safer means of preserving valuables, among other numerous factors, have been responsible for the restoration of law and order in the Province of Bengal.

The changes introduced by the Company during the transition period abolished some of the institutions serving useful purposes in the society for a fairly long period of the Indian history. Under the Company's resettlement the Indian zamindars had been deprived of their foudary jurisdiction of apprehending criminals and trying or submitting them for trial to the local foudars. Under the Mughals the zamindars with the local thannadars brought to the notice of the Government the disorder and breaches of the peace as took place in the different parts of the provinces. Under the Company, for the purpose of criminal administration there was no longer an intermediary body acting between the people and the Government. The *chakeraun* lands allotted to the thannadars and pykes for the service in guarding the villages and large districts against robbers had been taken away by the Company and their services dispensed with. The few men retained by the Company on the basis of the monthly salary were always engaged in assisting the farmers of revenue in their work of collection and did not discharge their duties of the thannadars and pykes since dismissed. The newly introduced farming system, useful though it was to the Company's Treasury, was responsible for the removal of the immemorial usage which allowed restitution to

³⁵ The Letter of the Magistrate of Dacca-Jallalpoore to the Government of Bengal, 1802, Fifth Report, 1812, Vol. I, p. 127 (Firminger's edition)

³⁶ Minutes of the Governor-General in Council, 24 November, 1810

the public of all damages and losses caused by robbers. The zamindars during the Mahomedan period under terms of the leases of the zamindari had to reimburse, like the kings of the Hindu period, the losses sustained by individuals. Now after the *diwani*, the responsibility of compensating the persons aggrieved lay with the Company's Government and no longer with the local zamindars. The Government of the Company in a very few cases could satisfy the public with restitution of damages and loss sustained. The Company soon discontinued the system of reparation to the injured.

In addition to these difficulties ascribable to the changes introduced by the Company in the period of transition from one form of Government to another, there were a few others created by Mahomedan law as administered by country courts of those days. The Mahomedan law, for example, required two positive witnesses to award a capital punishment. But dacoits committed their atrocities usually at night or under disguise enabling the criminals to repair unidentified. Moreover, the dread of the dacoits prevented people to give evidence as to their identification. Thus two eye witnesses were very rarely available to enable the court to inflict capital sentences to the dacoits. Thus the guilt of dacoity could be proved by the confession of the dacoits alone. For persuading confession, resort was therefore taken to torture and oppression which acts, again, were illegal and inhuman.

There were other technicalities of Mahomedan law creating loopholes for the criminals to avoid capital punishments. Thus when a murder had been perpetrated by means of an instrument not designed for shedding blood it would be held that the intention to kill was not proved, and a fine, instead of death, was to be inflicted. The distinction between lethal and non-lethal weapons had been sometimes carried too far. A dacoit killing another in self-defence with a sword or knife would be condemned to death; but where he held the head of a child under water till her death and made a prize of her clothes and the little silver ornaments which she wore, the dacoit had been found guilty of manslaughter and condemned to pay the price of blood which was usually fixed at Rs. 3,333-5a-4p.³⁷

37 Proceedings of the Council at Fort William, 3 August, 1773

Then there was the privilege allowed to the nearest-of-kin to a murdered person to pardon the murderer. Thus in a case of murder of the father by the mother, the accused mother could be ordinarily forgiven by the children who happened to be the nearest-of-kin to the deceased to exercise the privilege of pardon. Weak minds in order to avoid ill fame of implacability, the hauntings of the ghost of the punished criminal or the sanguinary revenge of his relatives, or the displeasure of the foudjar incurred in rejecting his intercession on behalf of the convict, were almost invariably inclined to exercise their painful privilege of pardoning the criminal in favour of the accused. Such a system of penal law no doubt frustrated the purpose it sought to serve in those days of an inchoate administration under the Company. Hastings³⁸ and the collector of Bihar³⁹ and other officers of the time drew the attention of the Council at Fort William to the needs of a reformed code of penal law to be administered in the courts of the Provinces of Bengal, Bihar and Orissa.

On 19 April, 1774, it was proposed that in order to meet notorious disorders in the country, suitable measures should be adopted. It was accordingly proposed to appoint foudjars at the various stations for the protection of the inhabitants, the detection and apprehension of public robbers within the respective districts and for transmitting constant intelligence of all matters relating to the peace of the country to the Presidency. The zamindars, farmers, and other revenue officers were required to render due assistance to the foudjars that were appointed.

A few Regulations were passed on 17 May, 1774, providing for various things. The sale, purchase or possession of a slave without a *caubala* or deed attested in the usual manner by the kazi of the place where the slave was purchased, was declared illegal. This provision pertained to the slaves duly purchased before July 1, 1774. From this date, sale or purchase of a slave

³⁸ Hastings's Letter to the Council at Fort William, 1 July, 1773

³⁹ Collector of Bihar's Letter to the Council at Fort William, 24 December, 1789

was declared illegal. Persons concerned in this purchase or sale, including the kazi, were punishable and the *caubala* deed, where any, would be deemed invalid. On further elucidation of law it was decided that children of the slaves could be retained as slaves but not further.⁴⁰

With the establishment of the English Government the practice of stealing children from their parents and selling them as slaves greatly increased. The laws and regulations governing the slave trade during the Mughal period which provided that no slave could be sold without a *caubala* attested by the kazi, signifying the child's abode, its parents' name, the names of the seller and the purchaser and a minute description of the person of the both so that identification might be rendered possible, were no longer in force owing to the absence of the sanction behind such restrictive provisions. During the Company's period such restrictions were relaxed. The English, Dutch, French and Portuguese traders trafficking in slaves, exercising their influence associated with the English names, because the simple village folks could rarely distinguish between one European national and another, exploited the situation of the lax control. This state of things shocked the sentiment of the Governor and Council at Fort William who attempted to do away with the institution of slavery itself by enacting the above regulations. Only slaves purchased prior to the new prohibitive legislation were allowed to be retained. The Government consulted the respectable citizens of the time, both Hindu and Mahomedan, who held that the abominable practice of slavery was anti-religious and as such should be abolished.⁴¹ The Company's Government took steps against the secret practice of trafficking in slaves by virtue of its inherent powers. The abolition of slavery in the Company's territories was however found impracticable because of two reasons, namely, (1) that the number of slaves was considerable and (2) that the practice was tolerated by Hindu and Mahomedan laws.⁴² Even in the beginning of

⁴⁰ General Letter of the Governor and Council to the Court of Directors, 18 October, 1774

⁴¹ *Ibid.*, para. 22

⁴² Lord Cornwallis's Despatch to the Court of Directors, 2 August, 1789

the 19th century forced labour was legalised.⁴³ Neglect of duty was a criminal offence.⁴⁴ It was only with the abolition of slavery⁴⁵ that the rigour of the penal provisions behind a certain type of contractual labour was mitigated.⁴⁶ It was not till 1931, however, that the penal sanction behind the contract of labour between employer and employees was removed from the statute books of British India. It was in 1931 that the Coorg Labour Act of 1926 came to an end. The Royal Commission on Labour in India was appointed in 1929 and it submitted its report in 1931. The Commission made recommendations for the enactment of a new Act with the threefold object of (1) the freer movement of labour, (2) the greater security to labourers, and (3) the better administration of the law. These recommendations were incorporated by the Government of India in the Tea Districts Emigrant Labour Act, 1932 which came into force on 1 October, 1933.⁴⁷

As late as 1840, slaves were sold in India in open markets. A zamindar of Calcutta on his way home from Benares purchased a slave for Rs. 40 in a Bhagalpur market. He told the *Gyananeshun* that on the particular day 20 to 25 slaves both men and women were sold in that market.⁴⁸ Slave trade continued in India till 1843 when slavery was prohibited in India by the Indian Slavery Act of the same year enjoining the court not to enforce or recognise the claim of any person upon a slave; and it was finally abolished by making slave holding punishable under the Indian Penal Code of 1860. The Company, however, found that in India the relation between slaves and their masters was one of domestic submissiveness and their position here could not be likened to that in Europe or America. For the practice of slavery among the Hindus and the Mahomedans, the price of slaves, their rights and privileges and the powers of a Act, 1859; Sections 490 and 492 of the Indian Penal Code, 1860; the Employers and Workmen's (Disputes) Act, 1860; The Assam Labour and Emigration Act of 1901; Madras Planters' Labour Act, 1903

⁴³ Bengal Regulation XI of 1806 as amended by Bengal Regulation III of 1820

⁴⁴ Bengal Regulation VII of 1819; The Workmen's Breach of Contract

⁴⁵ Indian Slavery Act, 1843; Act XLV of 1860

⁴⁶ Act VII of 1862

⁴⁷ For other labour laws see India Code — Vol. V, Part VII — Labour

⁴⁸ *Gyananeshun*, 11 January, 1840

master over his slave, a detailed study was made by the first Indian Law Commissioners and a Report submitted on *Slavery in India* dated 15 January, 1841.⁴⁹

⁴⁹ See also (A.) No. V: Powers of a Master over his slave, *Special Reports of the Indian Law Commissioners*, 1842, pp. 209-55. See also p. 307 regarding the extent of the search made on slavery by the Commissioners

VII

THE PROVINCIAL COURTS OF APPEAL

THE TERRITORIAL jurisdiction of six mofussal dewani courts established under the Regulations of April 11, 1780, at Calcutta, Moorshedabad, Burdwan, Dacca, Purnea and Patna were extraordinarily extensive. Accordingly on 6 April, 1781, the number of mofussal dewani courts was increased to 18. The jurisdiction of the prevailing six courts had of necessity to be redistributed. The 18 new courts were stationed respectively at Midnapur, Raghunathpur, Patna, Lowya, Darbhanga, Twajipur, Natore, Azimganj, Dacca, Bakarganj, Murli, Calcutta, Burdwan, Moorshedabad, Chatra, Bhagalpur, Rangpur and Islamabad. Of these 18 courts, the first 14 being situated in large towns were to be each placed under the superintendence of a covenanted civil servant of the Company to be styled Judge instead of Superintendent as under the Regulations of April 11, 1780. The persons who were in charge of collections of revenue had no jurisdiction in these 14 courts. The remaining four courts at Chatra, Bhagalpur, Rangpur and Islamabad being situated on the frontiers of the Provinces of Bengal, Bihar and Orissa and in areas sparsely populated had no special judges like the first 14 and had to be presided over by the collectors of revenues until further changes were introduced. By the Regulations of 5 July, 1781, the mofussal dewani court at Lowya was transferred to Mehsi in the Champaran district, the court at Raghunathpur was removed to Rajhat; and that at Azimganj shifted to Sultansi. The number of such courts increased to 28, 36 and more in course of time.

From the decisions of the provincial dewanny adawluts appeals lay in certain cases to the Governor-General in Council. As much of the time of the Governor-General in Council was to be expended in the general administration of the Provinces of Bengal, Bihar and Orissa, the amount appealable was restricted to a certain value. But in practice this restriction as to the amount appealable was found to have been prohibitive because the

greater number of causes decided by the provincial dewanny adawluts were not appealable at all if the amount was prescribed so high. In addition to this jurisdictional bar the distance and expense of travelling in many cases operated as an exclusion from the court of appeal. To remedy these defects the Governor-General in Council in 1793 instituted four Provincial Courts of Appeal, one in the neighbourhood of Calcutta, one at Moorshedabad, one at Dacca and one at Patna.¹ Each of these courts was to be superintended by three judges who were to be selected from the covenanted servants of the Company, to be styled the first, the second, and the third judge respectively. A fifth Court of Appeal was constituted in like manner in 1795 for the Province of Benares, and a sixth for the ceded and conquered territories of Berar and Oudh in the year 1803. A Registrar with one or more European assistants was attached to each appellate court. Three Indian law officers consisting of a kazi, a moofiti and a pundit, with a number of competent Indian ministerial officers, were to help the judges of the Provincial Courts of Appeal.

Appeals might be preferred in the Provincial Courts of Appeal from the decrees of the city and zillah courts passed by these latter courts in the first instance.² The decrees of these city and zillah courts on appeals from the Indian Commissioners were final.³ And so in cases of appeals from the decrees of their registrars, except for real property where the decision of the registrar was reversed in which contingency an appeal from the decrees of the city and zillah courts would lie to the Provincial Courts of Appeal. The Provincial Court of Appeal, however, possessed a discretionary power to entertain an appeal in any case the appellate court considering such entertainment necessary in the interests of a due administration of justice.⁴ The appellate courts had the further power to take, where necessary, further evidence for the first determination of the suit before them or to refer it back to the court in which it originated with special directions to the judge of the court below regarding the additional evidence he was to receive as might be considered most conducive to justice. The appellate

¹ Regulation V of 1793

² Sec. 23 of Regulation XLIX of 1803

³ Sec. 22, *ibid.*

⁴ Sec. 24, *ibid.*

courts in exercising this jurisdiction had to record in every case the reasons for exercising the extraordinary powers thus vested in them.⁵

The Provincial Courts of Appeal, like the city and zillah courts, were not permitted to correspond by letter with the parties in suits or with each other on matters within their cognisance. Official intercourse, if any, was to be done by certificate or precept in writing under official seal and signature of the person duly authorised in this behalf. Every process, rule and order had to be executed and return made within a specified time. Disobedience or negligence in this behalf on the part of the city or zillah judge was to be reported to the Sudder Dewanny Adawlut at Fort William which authority had the power to suspend the delinquent judge from his office, notifying the same measure for the ultimate sanction of the Governor-General in Council.

The parties in a litigation had been allowed the privilege of suing on an oath and furnishing a suitable security the judge of the city or zillah court before the Provincial Court of Appeal for having been guilty of corruption. On such an allegation the Provincial Court of Appeal had to forward the charge to the Sudder Dewanny Adawlut for the necessary action to be taken by the latter.⁶ The highest dewanny court would issue, if necessary, a special commission to the Provincial Court of Appeal forwarding the charge to make such enquiries and to take such evidence as might be deemed advisable. The Provincial Courts of Appeal thus were not permitted to make enquiries in the first instance. The object of this prohibition was twofold. First, the judges of the city and zillah courts were not to be made personally subject to the authority of the judges of the Provincial Courts of Appeal. Secondly, such subjection, if allowed, of the city and zillah court judges, would deprive the court of the veneration and awe with which it had been held in the eyes of the people. Ordinarily, the control of the Provincial Court of Appeal Judges over those of the city or zillah courts had been one of a superior court empowered with the authority of revision of the decrees of a court below them re-

⁵ Hurree Mohun Thakoor & Ramnarash Deo (1808)

⁶ Proceedings of the Sudder Dewanny Adawlut, March 14, 1799

gularly brought before them in the way of appeal.

In 1805 the Provincial Courts of Appeal were authorised to admit a summary appeal in cases where the zillah and city courts refused to admit or hear original suits on the ground of default, delay or other informality.⁷ In 1808 the zillah and city courts were restricted in their original jurisdiction to suits of the value of Rs. 5,000 over which sum they were to be originally cognisable in the Provincial Courts of Appeal.⁸

The manuscript proceedings of the different courts of appeal show that decrees were passed on *razeenamah* in a very large number of cases.

The Provincial Courts of Appeal were gradually superseded and the zillah and city judges were empowered instead to have primary jurisdictions in all suits exceeding Rs. 5,000 in value.⁹ An appeal lay from their original decisions to the Sudder Dewanny Adawlut.¹⁰

In 1833 the Provincial Courts of Appeal were finally abolished. All original suits then pending in such courts were directed to be transferred to the zillah and city courts and all appeals regular, special or summary so pending were to be transferred to the Sudder Dewanny Adawlut.¹¹ Additional zillah and city judges were also appointed.¹²

The zillah and city judges as administrators of law could legitimately question the interpretation of Regulations by the appeal courts and send their own interpretations to the Sudder Dewanny Adawlut or Sudder Nizamut Adawlut through the respective Courts of Appeal. They were however bound to carry out the precepts of the Courts of Appeal. The Sudder Dewanny Adawlut on the 8th November, 1797, for example, sent a copy of its Resolution to the judge of zillah Jessore (Mr. John Melvill) explaining their interpretation of the law in force for the information and guidance of the judge concerned. The question arose from the difference of opinion among the said judge and the Calcutta Provincial Court of Appeal.

7 Section 11 of Regulation II of 1805

8 Sections 2 and 3 of Regulation XIII of 1808

9 Section 27 of Regulation V of 1831

11 Section 5 of Regulation II of 1833

12 Section 2 of Regulation VIII of 1833

10 Section 28, *ibid.*

The judges of the zillah, city and appeal courts seem to have generally relied on their own knowledge for the interpretation of the Regulations. In some cases they are found to have followed books imported from Europe. The judges of the Dacca Court of Appeal, 1798, informed the Sudder Dewanny Adawlut that on a reference to Blackstone they came to find that they had hitherto wrongly interpreted Section 7 of Regulation XVIII of 1797 and the provisions of Regulation XVI of 1793, and a reference was made to that effect to the Sudder Dewanny Adawlut for their solution.

The zillah judges, too, exerted themselves for the due discovery of the law applicable in individual cases. Thus when the claimants were Portuguese, the judge of zillah Chittagong sought enlightenment from the Sudder Dewanny Adawlut on the nature of the personal law applicable. The Registrar of the Sudder Dewanny Adawlut, at the instance of the Court, obtained the opinion of the Advocate-General respecting certain points of the law of Portugal. The Registrar's letter directed the judge to adopt the suggestion conveyed in the Advocate-General's opinion, that is, to call upon the party to prove by witnesses the fact of what the law of Portugal was. The "learned and enlightened" Reverend Portuguese Father of Calcutta was approached for the solution. The Reverend Father's opinion, along with the interpretation attached to it by the Sudder Dewanny Adawlut, was transmitted to the judge of the zillah Chittagong. The Father's opinion appearing inadequate, the judge again referred the matter to the Sudder Court.

The Sudder Dewanny Adawlut is not found to have been dissatisfied with the Provincial Courts of Appeal except, in some cases, for the paucity of the volume of work done by them. The manuscript Reports on the Abstract Registers of the Provincial Courts of Appeal, and the City and Zillah Courts indicate that their work was otherwise satisfactory to the Sudder Dewanny Adawlut.

THE LAWS IN OPERATION

BY THE ROYAL Charter granted in 1726, the 13th year of the reign of King George I, all the common and statute law at that time extant in England was introduced into the Indian Presidencies.¹

The Regulating Act, the 13th Geo. III. c. 63, passed in 1773² empowered the Governor-General and Council to make and issue such Rules, Ordinances, and Regulations, for the good order and civil government of the United Company's settlement at Fort William in Bengal, and all places subordinate thereto, as should be deemed just and reasonable, and not repugnant to the laws of the realm; such Regulations would not be valid unless registered in the Supreme Court of Judicature to be established under the said statute. In 1797 the 37 Geo. III. c. 142 confirmed the power of making local laws already vested in the Governor-General in Council. In 1807, the 47 Geo. III. Sess. 2, c. 68, too, conferred more formally the same power on the Bombay and Madras Governments.

The 3rd and 4th William IV. c. 85, by Section 43, empowered the Governor-General in Council for India to legislate for India, for repealing, amending or altering, former or future laws and regulations, and by making laws and regulations for all persons whether British or native, foreign or others, and for all courts of justice, whether as established by His Majesty's Charters or otherwise. Such laws and regulations would have the force of Acts of Parliament and their registration and publication in any court of justice would be unnecessary. The right of Parliament to legislate for India was however not affected.

The Declaratory Act of the 21st Geo. III. c. 70, which was passed in 1781 for explaining and defining the powers and jurisdiction of the Supreme Court at Fort William in Bengal, expressly enacted, by Section 17, that, in disputes between the native

¹ Clarke's Rules and Orders of the Supreme Court of Judicature at Fort William in Bengal, 1829

² Sections 36 and 37, *ibid.*

inhabitants of Calcutta, "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined, in the case of Mohammadans by the laws and usages of Mahomedans, and in the case of Gentus (Hindus) by the laws and usages of Gentus; and where only one of the parties shall be a Mahomedan or Gentu, by the laws and usages of the defendant". Section 18, too, of this Act preserved to the natives their laws and customs.

This reservation of the native laws to Hindus and Mahomedans was extended to Madras and Bombay by Sections 12 and 13 of the 37th Geo. III. c. 142 passed in 1797. Under this statute the Recorder's Courts at Madras and Bombay were established superseding the Mayor's Courts there. Sections 12 and 13 of this statute respectively re-enacted the 18th and 17th Sections of the 21st Geo. III c. 70.

By 39th and 40th Geo. III. c. 79, s. 5, in 1799-1800, and 4th Geo. IV. c. 71, s. 9, in 1823, all powers and authorities granted to the said Recorder's Courts at Madras and Bombay were transferred to the Supreme Courts at those Presidencies to be established respectively under the said statutes. Section 22 of the Charter of Justice of the Supreme Court at Madras, and Section 29 of the Charter of Justice of Supreme Court at Bombay contained the provisions of the 13th Section of the 37th Geo. III. c. 142.

In the mofussil, the old system of courts, procedures and laws was retained to a very great extent and for a considerable period of the Company's regime. Rule 23 of the Hastings's Plan of 1772 (for Bengal, Bihar and Orissa) reserved to the natives their laws; and so did the first Regulation as was passed on the 17th April, 1780. By Section 27 of this Regulation it was enacted, "That in all suits regarding inheritance, marriage, and caste, and other religious usages or institutions, the laws of the Koran with respect to Mahomedans, and those of the *shaster* with respect to Gentoos, shall be invariably adhered to". In 1781 this Section was re-enacted in the Revised Code with the addition of the word "succession".³

Section 15 of Regulation IV of the Bengal Code, 1793, enacted that in suits regarding succession, inheritance, marriage and caste and all religious usages and institutions, the Mahomedan laws

³ Beng. Jud. Reg. VI of 1781, S. 37

with respect to Mahomedans, and the Hindu laws with regard to Hindus, were to be considered as the general rules by which Judges were to form their decisions. Section 3 of Regulation VIII of 1795 also enacted, in addition to the provision of Section 15 of Regulation IV of 1793, that in causes in which the plaintiff should be of a different religious persuasion from the defendant, the decision was to be regulated by the law of the religion of the latter; excepting where Europeans, or other persons, not being either Mahomedans or Hindus should be defendant, in which cases the law of the plaintiff was to be made the rule of decision in all plaints and actions of a civil nature. The same provisions were extended to Benares and Upper Provinces.⁴

Section 8 of the Bengal Regulation VII of 1832 rescinded the portion of Section 3 of Regulation VIII of 1795, above quoted, and enacted that the rules contained in Section 15 of Regulation IV of 1793 and Section 16 of Regulation III of 1803 should be the rule of guidance in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions that might arise between persons professing the Hindu and Mahomedan persuasions respectively. Section 9 of this Regulation VII of 1832 laid down: "Whenever . . . in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindoo and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindoo persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles".

The above innovation was for the time being confined to the Bengal Presidency. Earlier, when courts of judicature were first established by the East-India Company in the Madras Presidency, in the year 1802, Regulation III of the new Code was

⁴ Sec. 3 of Reg. VIII of 1795; Sec. 16 of Reg. III of 1803

formed on the Bengal Regulation IV of 1793, nearly the same words being used with regard to the preservation of the Hindu and Mahomedan laws as those employed in the latter Regulation. In the Bombay Presidency also, in the year 1799, the Governor and Council passed a Regulation, namely, Regulation IV of 1799, to the like effect but more explicit and extensive in its application. This Bombay Regulation IV of 1799, by Section 14, secured to Hindu and Mahomedan defendants, the benefit of their own laws in civil suits respecting "the succession to, and inheritance of, landed and other property, mortgages, loans, bonds, securities, hire, wages, marriage, and cast, and every other claim to personal or real right and property, so far as shall depend upon the point of law". It also provided that in the case of Portuguese⁵ and Parsi⁶ inhabitants, the judge was to be guided by a view to equity in his decisions, making due allowance for their respective customs, so far as he could ascertain the same. Regulation II of 1800 re-enacted the same provisions. In 1827, when all the Judicial Regulations previously passed by the Bombay Government were rescinded, it was enacted that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant; and, in the absence of specific law and usage, justice, equity, and good conscience alone."⁷

The Parsis were governed by the law of their customs.⁸ Their marriage contracts were governed by their customs.⁹ The Regulations were also applicable to them.¹⁰ Apart from customs and Regulations, the Parsis were held entitled even in the Sudder Court at Bombay to the benefits of the English law.¹¹ The

⁵ See also *post*.

⁶ Deen Shah *v.* Pestunjee (1822) 2 Borr. 375. See also *post*.

⁷ Bombay Regulation IV of 1827, Section 26

⁸ Deen Shah *v.* Pestunjee (1822) 2 Borr. 375

⁹ Nowrojee Khooshedjee *v.* Dhuna Bacc (1811) 1 Borr. 382

¹⁰ Furidoonjee *v.* Jumshedjee (1811) 1 Borr. 23.

¹¹ Section 42 of Reg. III of 1800; Lulloo Bhaee Girdhurdass *v.* Sorabjee (1814) 1 Borr. 121. Buchooboye *v.* Merwanjee Nasserwanjee (1844). Perry's

Parsis did not want the English law, in its entirety,¹² but they wanted to be governed by the principles of English law subject to their customs and with the necessary exceptions in regard to the law of succession on a man's dying intestate.¹³

The Armenian law where ascertainable was applied to the Armenians.¹⁴ Otherwise, they were governed at Fort William by principles of British law.¹⁵ It will be recalled that the Armenians in India desired as early as 22 June, 1688, to be governed by the law of England.¹⁶ The Jews at Calcutta were governed by English law.¹⁷ The Portuguese in British territories were held British subjects governed by English law.¹⁸

Subject to above, it may be observed that the class of natives of India who were neither Hindus nor Mahomedans relied in most instances almost entirely upon custom.

The courts functioning at the three Presidency towns had had laws and procedures different to a great extent from the courts of law functioning in the rest of the British empire in India.

The law obtaining in the Mayor's Courts at Calcutta,¹⁹ Madras and Bombay, the Recorder's Courts at Madras and Bombay and the Supreme Courts at Calcutta, Bombay and Madras consisted of the following:

(1) The common law as it prevailed in England in 1726 and which had not subsequently been altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

(2) The statute law which prevailed in England in 1726 and

Notes, Case 15

12 Special Reports of the Indian Law Commissioners, 1842, 465

13 Special Reports of the Indian Law Commissioners, 1847, 619, 621: Minute by G. Giberne dated, 27 January, 1843, and Minute by Anderson, dated the 23rd.

14 *Avietick Ter Stafanoos v. Khaja Michael Aratoon* (1820) 3 S.D.A. Rep. 9

15 *Doe dem. Aratoon Gasper v. Puddolochun Doss* (1815), East's Notes, Case 36. *Emin v. Emin*, cited in *Stephen v. Hume*, 1 Fulton 227

16 Special Reports of the Indian Law Commissioners, 1842, 465

17 *Musleah v. Musleah* (1844), 1 Fulton 420

18 *Joanna Fernandez v. De Silva*, (1847) 2 S.D.A. Rep. 227; Special Reports of the Indian Law Commissioners, 1842, 465

19 See also *post*.

which had not subsequently been altered by statutes especially extending to India or by the Acts of the Legislative Council of India.

(3) The statute law expressly extending to India, which had been enacted since 1726, and had not been repealed and the statutes which had been extended to India by the Acts of the Legislative Council of India.

(4) Civil law as it obtained in the Ecclesiastical and Admiralty Courts in England.

(5) Regulations made by the Governor-General in Council and the Governors in Council previously to the 3rd and 4th William IV. c. 85, and registered in the Supreme Courts, the Acts of the Legislative Council of India made under the 3rd and 4th William IV. c. 85, and the Acts of the Local Governments of Bombay and Madras after the restoration of legislative power in their favour in 1861, and of the Local Government of Bengal after the Legislative Council had been constituted there on 17 January, 1862.²⁰

(6) The Hindu law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu was a defendant.

(7) The Mahomedan law in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Mahomedan was a defendant.

The Laws administered in the Sudder and Moffussil Courts were the following:

(1) The Regulations enacted by the Governments at the three Presidencies previously to the 3rd and 4th Will. IV. c. 85 and the Acts of the Legislative Council of India passed subsequent to that statute, and later also the Acts of the Governments at the three Presidencies. Under the Charter Act of 1833 the Governor-General became the sole authority for promulgating laws for all persons and courts of justice. Under the Charter Act of 1853 a sort of Legislative Council was established composed of members of the Supreme Council, one representa-

²⁰ The Indian Councils Act, 1861

tive each from the Local Governments and two Judges of the Supreme Court at Calcutta. This Legislature enacted, for a time, all laws whether of Provincial or all-India application. The Local Governments either themselves sent legislative proposals to the Centre or, after 1854, got them introduced there through their representative sitting there. This state of things continued till 1861 when legislative power was restored to the Governments of Bombay and Madras. The Bengal Legislative Council was also constituted, as noted before, on 17 January, 1862.

(2) The Hindu civil law in all suits between Hindu parties regarding succession, inheritance, marriage, and caste, and all religious usages and institutions.

(3) The Mahomedan civil law in similar suits between Mahomedan parties.

(4) The laws and customs, so far as the same could be ascertained of other natives of India not being Hindus or Mahomedans, in similar suits where such other natives were parties.

(5) The Mahomedan criminal law as modified by the Regulations. In Bombay the penal law of the Mahomedans was superseded almost completely by the Regulations. The penal law governing the people of the Presidency of Bombay could almost all be found in the extensive Bombay Regulation XIV of 1827. In Bengal it was from the year 1832 that the people of Bengal, Bihar and Orissa not professing Mahomedan faith were absolved, if they so desired, from the operation of the Mahomedan criminal law.²¹ In Madras, too, by the thirties of the nineteenth century, Mahomedan penal law was functioning only in name, it being modified and replaced by Regulations.²² By the time of the emergence of the Draft Indian Penal Code in 1837 the penal law of Bengal, Bombay and Madras widely differed from the criminal law of the Mahomedans.

From the provisions of the Charters, Statutes and Regulations referred to above it will appear that the law of contract of the

²¹ Article 5 of Reg. VI of 1832

²² The Indian Law Commission in their prefatory letter dated the 14th of October, 1837, while submitting the printed Draft Indian Penal Code to the Right Hon'ble Lord Auckland, Governor-General of India in Council.

Hindus, among their other laws, was, under the Company's regime, revived to a limited extent for its day to day application in the courts of law. This was specially true of the law as administered in the courts known as the Sudder and mofussil courts. It has to be noted however that the saving of the Hindu or Mahomedan laws could not be left unaffected under the Company's administration. The personal laws of the Hindus and Mahomedans had to be modified by the Regulations and Acts as passed by the legislative authorities from time to time.

The revival of the Hindu law and the continuance of the Mahomedan law were responsible for the emergence of a few new texts on the subjects of Hindu and Mahomedan law during the Company's regime. A mention may be made herein of a few such texts as especially pertained to the Hindu law of contract.²³

In the *Gentoo Code (Vivadarnava Setu)*²⁴ compiled in Sanskrit and rendered into Persian and translated into English, the law of contract was very succinctly and superficially discussed and bore an inconsiderable proportion to the rest of the work. Secondly, although Mr. Nathaniel Brassey Halhed performed the English translation with fidelity, yet the Persian interpreter had supplied him, according to Sir William Jones,²⁵ only with a loose, injudicious epitome of the original Sanskrit, in which abstract many essential passages were omitted. Sir William Jones accordingly in his letter to the Supreme Council of Bengal proposed to the Government the compilation of a new *Digest*, which was to be confined to the Laws of Contracts and Inheritances, and to be based upon the great work of Raghunandana. The result of this proposition, which was accepted by the Governor-General and the Members of Council, was the composition of the *Vivada Sararnava* and the *Vivada Bhangarnava*. The *Vivada Sararnava* was written, at the request of Sir William Jones, by Servaru Trivedi, a Mithila lawyer. The *Vivada Bhan-*

²³ For the work done during the Company's period in the matter of rendering the Hindu and Mahomedan laws in English, Persian, Bengali and Hindi, see Morley's *Analytical Digest*, vol. I, 1850, 'Introduction'. See also Section IX, *post*, for the translation into Bengali of the Regulations, Acts, etc., in operation

²⁴ For details as to *Gentoo Code* see Section IX, *post*.

²⁵ Memoirs of Sir William Jones, London, 1807, Vol. II, pp. 146-7

garnava was written by Jagannatha Tarkapanchanana and translated by Colebrooke.²⁶ This *Digest*, like the *Vivada Sararnava*, treated only of the law of contracts and successions, and contained an immense mass of most valuable information, more especially on the law of contracts. *A Treatise on Obligations and Contracts* was also written by Colebrooke.²⁷ It related to the subject of contracts generally. The author illustrated the law of contract throughout by reference to Hindu system, and in his book valuable information could be had regarding the Hindu system under the respective titles so far as the author could have completed them.

English common law principles were followed in cases of contract in the Supreme Courts at Calcutta, Bombay and Madras.²⁸ The Regulations as made by the Governors in Council or Governor-General in Council were also followed.²⁹ The common law distinction between parol contracts and contracts under seal was also maintained.³⁰ In the matter of the formulation of the principle of public policy³¹ or in cases of statutory illegality³² vitiating a contract the judges followed the principles as accepted in England. In their equity side the Supreme Courts exercised the principles of equity as a matter of regular jurisdiction.³³

²⁶ *A Digest of Hindu Law on Contracts and Successions, with a Commentary by Jagannath Tarkapanchanana*. Translated from the original Sanskrit by H. T. Colebrooke, 4 vols. Calcutta, 1797, 2nd edn. 3 vols. London, 1801. See *Memoirs of Sir William Jones*, London, 1807, Vol. II, pp. 307, 316-18

²⁷ *A Treatise on Obligations and Contracts* by H. T. Colebrooke, London, 1818

²⁸ *Binny v. Watson* (1800) 1 str. 69 (bailment). *Shaick Devaljee v. Mauray Chitty* (1809), 2 Str. 23. *Mohon Loll Tagore v. Noroojee Cahojee* (1815) East's Notes, Case 16. *Cursondass Hunsraz v. Ramdass Hurridass* (1842) Perry's Notes, Case 4. *Wood v. Goluckchunder* 1st Term. (1843) 1 Fulton 139 (bailment). *Coassimbhoy Nathbhoy v. Jewraz Balloo* (1846), Perry's Notes Case 17

²⁹ *Wujoo Bhaee v. Jaece Bhaee*, (1819) 1 Borr. 310 (interest).

³⁰ In the goods of Peacock (1781), Hyde's Notes, 1781, Mor. 6 (debts). In the goods of Kellican 1st Term. 1786, Mor. 10

³¹ *Park v. Mootiah*, (1799) 1 Str. 3

³² *Horssely v. Perreau*, Chamb. Notes, (1791) Mor. 362.

³³ *Watson*, Hyde's Notes (1799), Mor. 254. *Vencata Runga v. The East-*

As it has been seen, the question of jurisdiction of the Supreme Court at Calcutta over persons professing Hindu or Mahomedan religion had been a vexed question throughout the period of its existence. For an accurate study of the subject, reference may be made to the *placita* under head "Jurisdiction" in volume I of William H. Morley's *Analytical Digest*, 1850.

Whether a person was a Hindu or a Mahomedan did not form the sole point of contention in the question of jurisdiction. The *lex loci contractus*³⁴ as well as the terms of the contracts³⁵ were also considered relevant.

It was held that any person born in Calcutta before the year 1757 could not be included within the meaning of the term, "His Majesty's subject" in the 13th Geo. III. c. 63 s. 16.³⁶

Persons born in Bombay were considered as British subjects.³⁷ In *Manickram Chattopadhyia v. Meer Conjeer Ali Khan* (1782) it was decided that an inhabitant of Calcutta was not as such a British subject within the meaning either of the 13th Geo. III. c. 63 or the 21st Geo. III. c. 70. The principles of Hindu law even in the realm of contracts were therefore recognised.³⁸ It was often however the practice of the Supreme Court at Calcutta to administer English law between Hindu or Mahomedan parties as between British subjects, except only in cases falling within the specific exception in section 18 of statute 21 Geo. III. c. 70.³⁹

There were Court Pundits in the Supreme Court at Calcutta to express their views on questions of Hindu law.⁴⁰ The court sometimes compelled the parties to submit the matter to pundits of their own selection, and would decree on such opinion. *Opin-India Company*, (1803) 1 Str. 174 (unclean hands). *Gooroopersaud v. Habberly* (1815), East's Notes Case 32. *Sukies v. Sukies* (1816) 2 East's Notes, Case 42

³⁴ *Greedhur Baboo v. Sree Luchenundun Doss*, Hyde's Notes 1781 Sm. R. 52. Mor. 350

³⁵ *Christie v. Hadji Sirdar*, Hyde's Notes, 1783, Mor. 130

³⁶ *De Rozio v. Chatgeer Gosain*, Chamb. Notes, 1789, Sm. R. 104. Mor. 136

³⁷ *Manickchund Tagore v. W. Johnson*, Narain Sing v. W. Johnson (1785), Hyde's Notes Sm. R. 100 Mor. 131

³⁸ *Nocoor Bysack v. Gopalchand Seat*, Chamb. Notes (1788), Mor. 82. *Raja Burrodicaunt Roy v. Bisnosoondery Dabee* (1836) Mor. 91 (pledge)

³⁹ *Soodasun Sain v. Lockenauth* (1839). Mor. 107

⁴⁰ *Modun Mohun Corformah v. Nando Comar Corformah*, (1780)

ions of pundits were also read⁴¹ or referred to⁴² by the parties. Pundits were also personally interrogated by the court and all sorts of Sanskrit texts were referred to and consulted.⁴³ The same was true also of the Mahomedan law. Mahomedan law officers, like Hindu pundits, were attached in the Supreme, Sudder^e and mofussil courts.

The English laws prohibiting usury applied in India only to British subjects⁴⁴ and not to native lenders.⁴⁵ Inhabitants of Calcutta as such were not subject to the law of usury under statute 13 Geo. III. c. 63.⁴⁶ Interest agreed upon was accordingly allowed though more than 12 per cent where statute 13 Geo. III c. 63 did not apply.⁴⁷ A usurious contract between native parties was, however, held to be within the English statute 13 Geo. III. c. 63 if the contract had been made in Calcutta.⁴⁸ All this was however subject to equity. The Supreme Courts therefore sometimes disallowed interest at 12 per cent and sometimes even denied it altogether though expressly reserved by the contract, where the transaction was usurious and oppressive.⁴⁹ Interest was, again, sometimes allowed on the basis of usages of trade.⁵⁰ All this was responsible for the position that where statute 13 Geo. III. c. 63 did not apply to native parties, a security or contract though usurious in its nature could not be held void, and yet the court could or would allow only such interest as a British subject could legally take.⁵¹ The Supreme Court could, on this prin-

41 Russik Lall Dutt *v.* Chiton Churn Dutt (1789)

42 Sree Ooday Cower *v.* Mohun Lal Bussey (1790-91)

43 Radhamoney Dassi *v.* Sri Muti Durga Dassi (1794)

44 Hullodhur Ghose *v.* Connoyloll Tagore (1844) 1 Fulton 411

45 Issenchunder Chatterjee *v.* F. W. Biddle (1851); Essen Chunder *v.* F. T. Biddle (1851)

46 Manickram Chattopadhyia *v.* Meer Conjeer Ali Khan, Hyde's Notes, (1782) Sm. R. 53, Mor. 125

47 Weston *v.* Chandraney (1778) Hyde's Notes (1778) Sm. R. 51, Mor. 231

48 Greedhur Baboo *v.* Sree Luchenundun Doss, Hyde's Notes 1781 Sm. R. 52. Mor. 350

49 Gooroopersaud Bose *v.* Habberly (1815) East's Notes, Case 32

50 Bissumber Mullick *v.* Stubb (1821) East's Notes, Case 28. Dada Bhace Ruttunjee *v.* Joseph Nimmo (1822) 2 Borr. 339

51 Ramsunker Halder *v.* Anundo Moy, Chamb. Notes 1788, Sm. R. 134;

ciple of equity, apply the principle of illegal interest even where the parties were not His Majesty's subjects.⁵²

The Hindu law as enunciated in the *shastras* was applied in cases of mortgages by the Hindus.⁵³ The sanctity of usage and immemorial custom was recognised in the Supreme Courts. It was on the recognition of the force of usage obtaining in Bengal that it was held in *Sibnarain Ghose v. Russick Chunder Neoghy* (1842)⁵⁴ that a Bengalee mortgage even though unaccompanied with possession gave a lien upon the land. Regulation I of 1798 was also found to have fortified the decision as arrived at by the Supreme Court.

Trade usage of the Hindu community had had the force of law.⁵⁵ The local customs of merchants were thus applied as the basis of decisions.⁵⁶

Land was made subject to debts in the hands of British, Hindu or Mahomedan subjects; in the hands of the two latter by their general codes; in the hands of the British subjects, by the terms or construction of the Charter, and of the Acts auxiliary to it.⁵⁷

The law governing the rights and disabilities of minors whether under the Hindu or Mahomedan law was given its due consideration in the Sudder and Supreme Courts. For the peculiarities of the Mahomedan law regarding infancy or limitation a reading of the *placita* under the respective heads of "Infant" and "Limitation" in William H. Morley's *Analytical Digest*, 1850, vol. I. will be very useful.

According to the several Hindu texts, the sixteenth year

Prawnkissen Dur v. Oditchurn Roy (1815) Sm. R. 54

⁵² *Sreemutty Janokey Dossee v. Durgaram Dossee*, Hyde's Notes, (1779) Sm. R. 51 Mor. 349. *Kistochurn Shaw v. Rutton Coondoo*, Hyde's Notes, (1780) Sm. R. 51 Mor. 350. *Petruse David v. Suckrajet Phahurry* (1782) Sm. R. 52. *Forbes v. Day Chamb.* Notes, 1786, Sm. R. 134 Mor. 351

⁵³ *Mt. Goolab v. Mt. Ichha* (1820) 1 Borr. 313; *Raja Burrodicaunt Roy v. Bisnosoondery Dabee* (1836) Mor. 91; *Parvutee v. Sooruj*, (1823) 2 Borr. 516

⁵⁴ Cited, *Sibchunder Ghose v. Russick Chunder Neoghy* (1842) 1 Fulton 36

⁵⁵ *Mohon Loll Tagore, v. Noroojee Caboojee* (1815) East's Notes, Case 16

⁵⁶ *Morell v. Cockerell* (1835) 1 Fulton, 209

⁵⁷ *Joseph v. Ronald*, 1 Moor. Ind. App. 327

limited the term of Hindu minority. Opinions, however, varied as to whether the limit was the first or the last day of the sixteenth year. According to Bengal authorities, the adult age began with the first day of the sixteenth year.⁵⁸ In *Lachman Das v. Rup Chand* (1831)⁵⁹ it was held that according to the Hindu law, majority began with the seventeenth year. Under Regulation XXVI of 1793, Section 2, minority, in the case of Hindus and Mahomedans, extended to the expiration of their eighteenth year. An infant could not execute a lease nor enter into any other agreement.⁶⁰ It will be interesting to recall that it was held in *Ranee Hurrosoondery v. Cowar Kistonaath Roy* (1841)⁶¹ that a Hindu father might, by will, postpone his son's majority beyond the age of sixteen years.

The English Statute of Limitations (21 Geo. III. c. 70, s. 17) did not apply to Hindu parties in the Supreme Court at Calcutta.⁶² The limitation by Hindu law had however to be specially pleaded between Hindu parties before the court.⁶³ Where the court could not presume from the names of parties that they were Hindus, the general law, that is, the law of England, was held applicable.⁶⁴ Where Hindu law of limitation was clearly applicable, its principles were applied even when inconsistent with the English rules thereon.⁶⁵

The claims of the personal laws of the Hindus and Mahomedans as well as of the English common law principles of contract were, as we have seen subject to the rules⁶⁶ and notions⁶⁷ of

⁵⁸ Morley's *Digest*, vol. I, 1850, 302

⁵⁹ 5 S. D. A. Rep. 114, (Sudder Court, Calcutta)

⁶⁰ *Kallupnath Singh v. Kumlapat Jah* (1829) 4 S. D. A. Rep. 339 (Sudder Court, Calcutta)

⁶¹ 1 Fulton. 393

⁶² *Kistoochund Seal v. Ramdhone Nundun* (1834) Mor. 345; *Meenaschyer Brahminee v. Arnachella Chittee* (1840) Mor. 345. *Kristnochunder Sircar v. Ramdhone Nundy* Mor. 345

⁶³ *Mohun Persad Takoor v. Loll Beharry Chamb.* Notes (1790) Sm. R. 92 Mor. 392

⁶⁴ *Mahadan Dutt v. Muttee Chund* (1824) Mor. 344

⁶⁵ *Parvutee v. Sooruj* (1823) 2 Borr. 516

⁶⁶ *Sir William Burroughs v. Gopeenath Bose*, (1821), East's Notes, Case 24

⁶⁷ *Latchemy Umma v. Lewcock*, (1800) 1 Str. 30 (agent and principal)

equity. The Supreme Courts exercised their equity jurisdiction⁶⁸ in cases of contract in order to mitigate⁶⁹ the rigours of personal laws of the Hindus and the Mahomedans or of the English common law as would otherwise be applicable in a case between party and party.⁷⁰ This might result in some cases in a deviation even from the recognised principles of the English common law of contract⁷¹ or in a conflict of decisions on the same fact situation.⁷²

The peculiarities of the Mahomedan law, including the law of contract, were obeyed.⁷³ A composition for murder, for example, was allowed by the Mahomedan law, and the agreement for it became a binding contract. For the acceptance of the said proposition in the *Sudder Dewanny Adawlut* at Calcutta, 4 *Hidaya*, 99, was relied on. The Governor-General and Council constituted, at the time, the said *Sudder Court* and the Court was presided on the day (10 April, 1794) by Sir John Shore.⁷⁴

The different schools of Mahomedan law on the subject of debts received occasional discussion.⁷⁵ Contracts of sale,⁷⁶ re-

⁶⁸ *Kissoree Dossee v. Mullick* (1815) *East's Notes*, Case 12; *Lukmeedas Vereedas v. Mt. Mankoonwur* (1821) 2 *Borr.* 114

⁶⁹ *Doe dem. Gunganarain Bonnerjee v. Bulram Bonnerjee*, *East's Notes*, Case 85

⁷⁰ *Jyasamy v. Colingaroy Moodeliar* (1809) 2 *Str.* 47, *Shaick Dévaljee v. Mauray Chitty*, (1809) 2 *Str.* 23. *Gooroopersaud Bose v. Habberly* (1815) *East's Notes*, Case 32

⁷¹ *Bungsheeder Shaw v. Tickman Buckett* (1820) *East's Notes*, Case 121 (obligation of principals to third parties)

⁷² *Bungsheeder Shaw v. Tickman Buckett* (1820) *East's Notes*, Case 121 (agent and principal) and *contra*, *Bank of Bengal v. The East-India Company* (1834), 2 *Knapp.* 245 (agent and principal)

⁷³ *Agha Mohammed Mahadustee v. Sait Gopal Doss Mookoondoss*, (1805) 1 *Mad. Dec.* 1 (*Sudder Court, Madras*); *Kurrimoollah Khan v. Hutton*, (1819), *East's Notes*, Case 101 (bill of exchange); *Nabob Roostoomjah Bahaudur v. Aga Mahummud Ebrahim* (1818) 1 *Mad. Dec.* 207; *Kishwur Khan v. Jewun Khan* (1799) 1 *S. D. A. Rep.* 25; *Mt. Rabea Khatoon v. Budroon-issa*, (1841), 7 *S. D. A. Rep.* 62

⁷⁴ *Nunda Singh v. Meer Jafier Shah* (1794) 1 *S. D. A. Rep.* 4.

⁷⁵ *Mt. Pootee Begum, Applicant* (1840) 1 *Sev. Cases*, 57.

⁷⁶ *Doe dem. Ramtonoo Mookerjee v. Bibee Junut* (1843) 1 *Fulton*, 152

lease,⁷⁷ assignment,⁷⁸ pledge⁷⁹ or the like⁸⁰ were decided on the basis of the principles of the Mahomedan law. Marriage contracts of the Mahomedans were governed by the principles of their personal law.⁸¹ Their personal law of limitation was also applicable.⁸² The Mahomedan principles of equity, as distinguished from the English, were given their due consideration.⁸³ A deed of contract containing a provision contrary to an express ordinance of the Mahomedan law was held void and ineffectual.⁸⁴

In the absence of the Hindu or Mahomedan law or a Regulation or Act governing a particular contract the English common law principles were followed also in the Sudder Courts.⁸⁵ Where Regulations,⁸⁶ Acts or general usage⁸⁷ governed the matter they were so applied. In those days, as now, questions of undue influence,⁸⁸ violence⁸⁹ or novation⁹⁰ arose for their determination and were decided on sound principles of law though in a language different from the one used in these days.

77 *Mt. Khanum Jan v. Mt. Jan Beebee* (1827) 4 S. D. A. Rep. 210

78 *Aiman Bibi v. Ibrahim Khan* (1833) 5 S. D. A. Rep. 304

79 *Muhammud Muthir Khan v. Sayud Abdul Hakim* (1832) 5 S. D. A. Rep. 226

80 *Beebee Jugun v. Bakir Ali* (1804) 1 S. D. A. Rep. 78; *Muhammud Umeer Khan v. Jumadar Bucha Bhaee* (1822) 2 Borr. 179

81 *Jumal Bhaee Kumal Bhaee Sonce v. Sahib Buhoo*, (1820) 2 Borr. 556; *Kureem Jeeun v. Mt. Muriyum* (1821) Sel. Rep. 56; *Mt. Fukhronissa v. Shah Ally Ruzzah*, (1840) 6 S. D. A. Rep. 293

82 *Mt. Khanum Jan v. Mt. Jan Beebee* (1827) 4 S. D. A. Rep. 49;

83 *Moulovee Syud Ashruf Ali v. Mirza Qasim* (1820) 3 S. D. A. Rep. 49; *Mirza Beebee v. Toola Beebee* (1829) 4 S. D. A. Rep. 334. *Mt. Hingoo v. Meer Fuzund Ali* (1828) 4 S. D. A. Rep. 307; *Hidalet Ali Khan v. Hissam Ali Khan* (1839) 6 S. D. A. Rep. 257

84 *Muhammud Yakub v. Wajid-un-Nissa* (1833) 5 S. D. A. Rep. 262

85 *Condawamy Moodley v. McLeod* (1826) (unlawful restraint); *Totah Rungiah v. Chenchomma* (1824) 1 Mad. Dec. 482 (Madras Sudder Court) (bailment). *Semlal Oodakishun v. Nainsook Soobaram* (1839) Sel. Rep. 196 (bailment)

86 *Krishto Mohun Ray -- Applicant* (1840) 1 Sev. Sum. Cases 69

87 *Mihirwanjee v. Wulubhdas* (1822) 2 Borr. 240

88 *Manikchand v. Raja Gooroonaraen* (1806) 1 S. D. A. Rep. 165

89 *Venkiah v. Vencatarauze* (1807) 1 Mad. Dec. 24

90 *Ramchunder v. Bhugwan* (1824) Sel. Rep. 12

As has been noted before, the Hindu law of contract was revived to a certain extent, though subject to the Regulations and Acts that might be passed by the Governors in Council or the Governor-General in Council. The principles of the Hindu law of contract were accordingly applied in causes coming before the Sudder Dewanny Adawlut,⁹¹ and obtained their recognition even in the Judicial Committee of the Privy Council.⁹² The usages⁹³ and customs of the Hindus on the subject of contract were also given the force of law. The opinion of the Hindu law officers, that is, the Court Pundits, under the Hindu law of contract might thus be superseded by a trade award.⁹⁴ Customs could thus determine the rate of interest payable.⁹⁵

The peculiarities of the Hindu law of contract were accepted. The possession of the subject of an agreement was not necessary by the Hindu law as current in Mithila to give validity to such agreement. It was accordingly held by the Sudder Dewanny Adawlut at Calcutta that the agreement would be valid even without possession of the subject thereof.⁹⁶ The *vyavashita* of the Hindu law officers in case of contract involving earnest money was accepted though not in consonance with the rules of the English common law governing the matter.⁹⁷

On the subject of contract, Hindu law was expressly applied in cases of bonds,⁹⁸ loans,⁹⁹ conditional acquittance of debt,¹⁰⁰

⁹¹ Sreenarain Rai *v.* Bhya Jha (1812) 2 S. D. A. Rep. 23; Ram Kewal Biswas *v.* Juggernath Biswas (1835) 6 S. D. A. Rep. 19

⁹² Rajunder Narain Rae *v.* Bijai Govind Sing (1839) 2 Moore Ind. App. 181 (P. C.)

⁹³ Dwalnath *v.* Kewal Ram (1826) 4 S. D. A. Rep. 123

⁹⁴ Brijbhookundas Veerchund *v.* Kuhandas Belchurdas (1823) 2 Borr. 234

⁹⁵ Dada Bhace Ruttunjee *v.* Nimmo (1822) 2 Borr. 339

⁹⁶ Sreenarain Rai *v.* Bhya Jha (1812) 2 S. D. A. Rep. 23

⁹⁷ Nursing Bhana *v.* Sunkerdas Mukundas (1815) 1 Borr. 403

⁹⁸ Rai Balgovind *v.* Sheikh Gholam Ali (1805) 1 S. D. A. Rep. 93; Jhyuttee Ram Misser *v.* Raja Mhyपाल Sing. (1819) 2 S. D. A. Rep. 316 (security bond)

⁹⁹ Jmoonah Raur *v.* Mudden Day (1785) Hyde's Notes, Sm. R. 143; Banarassy Ghosh *v.* Ramtonoo Dutt (1788) Chamb. Notes Sm. R. 144; Manuckchund Purbhoo *v.* Deo Kristn Tooligram (1824) Sel. Rep. 9

¹⁰⁰ Raja Jyporkas Sing *v.* Jug Rai Sahoo (1811) 1 S. D. A. Rep. 343

surety,¹⁰¹ unjust enrichment¹⁰² and other allied heads. The principles of pious obligations regarding debts of the different schools of Hindu law were duly recognised.¹⁰³ Modes of alienation of property not recognised by *shastras* were held to have created no title.¹⁰⁴ The concept of incapacity to contract of a Hindu minor and of the non-liability of his surety was given its recognition.¹⁰⁵ Marriage contracts of the Hindus were governed by their personal laws and customs of the castes.¹⁰⁶

The legal rates of interest under the Hindu law varied according to the caste or class of the borrower. The texts of the Hindu law regarding the limitation of interest as well as the invalidity or immorality of usurious loans and contracts had received different constructions in the hands of the different commentators. Regulations were also passed restricting interest as not to exceed the principal.¹⁰⁷

The Hindu law of limitation as enunciated in the Hindu *shastras* was applied in cases of contracts of the Hindus. The different stipulations as to the period of limitation as under *Mitacshara*, *Katyayana* and *Vyasa* were noted.¹⁰⁸ Regulations were also passed prescribing limitation for certain purposes.¹⁰⁹

¹⁰¹ *Bhaee Shah Keshoor v. Rajkoonwur* (1812) 1 Borr. 93; *Chuttoobhoj Ramanooj Doss v. Mohunt Hurnerian Doss* (1841) 7 S. D. A. Rep. 15

¹⁰² *Gopee Churun Burrall v. Mt. Lukhee Tishwuree Dibia* (1821) 3 S. D. A. Rep. 93

¹⁰³ *Hurree Kussun v. Runchor* (1811) Sel. Rep. 10

¹⁰⁴ *Kumla Kaunt Chuckerbutty v. Gooroo Govind Chowdree* (1829) 4 S. D. A. Rep. 322

¹⁰⁵ *Kallupnath Sing v. Kumlaput Jha* (1829) 4 S. D. A. Rep. 339

¹⁰⁶ *Nundalal Bhugwandas v. Tapeedas* (1809) 1 Borr. 14; *Huree Bhaee Bhuwaneedas v. Chundun* (1812) 1 Borr. 392; *Khooshal v. Bhugwan Mottee*, (1815) 1 Borr. 138; *Deochund Natha v. Juvehur Behchur* (1823) 1 Borr. 528; *Kaseeram Jaetaram v. Bhugwan Poorshotum* (1823) 2 Borr. 432; *Mt. Ruliyat v. Madhowjee Panachund* (1824) 2 Borr. 680; *Kumla Buhoo v. Munee-shunker Ichhashunker*, (1824) 2 Borr. 687

¹⁰⁷ *Rai Balgovind v. Sheikh Gholam Ali*, (1805) 1 S. D. A. Rep. 93; *Baboo Mottee Chund v. Mooftee Ubdollah*, (1823) 3 S. D. A. Rep. 261; *Khedoo Lal Khatri v. Rattan Khatri*, (1830) 5 S. D. A. Rep. 10; *Besambe Ade v. Kalin Udden* (1831) 5 S. D. A. Rep. 81; Reg. XV of 1793

¹⁰⁸ *Suyud Ghoolam Ruza v. Aja Bhaee* 1 Borr. 367; *Dhunmunnee v. Sonatun Sahoo* (1820) 3 S. D. A. Rep. 30

¹⁰⁹ Reg. III of 1793; Reg. II of 1805

Contracts in the nature of champerty¹¹⁰ or tinged with illegality¹¹¹ under the Hindu law were decided occasionally with reference to Hindu law. Questions of public policy and wager were also raised and determined.¹¹² The principles of equity because of their nature could not be ignored where deemed applicable.¹¹³

¹¹⁰ *Ram Gholam Sing v. Keerut Singh* (1825) 4 S. D. A. Rep. 12; *Baboo Brijnerain Singh v. Rajah Teknerain Singh* (1836) 6 S. D. A. Rep. 131; *Mt. Zuhooroonnissa Khanum v. Raseek Lal Mitter* (1840) 6 S. D. A. Rep. 298
¹¹¹ *Keshow Rao Diwakur v. Naro Junardhun Patunkur* (1822) 2 Borr. 194 (contract for shulk (dowry))

¹¹² *Ramlall Thakoorseydass v. Soojamull Dhondmull* (1847) Perry's Notes, Case 18 (gaming)

¹¹³ *Shureef Ahmud v. Takeer Sahib* (1821) 1 Mad. Dec. 280; *Lukmeedas Vereedas v. Mt. Mankoonwur* (1821) 2 Borr. 114 (idiocy); *Kumla Kaunt Chuckerbutty v. Gooroo Govind Chowdree* (1829) 4 S. D. A. Rep. 322

GENERAL OBSERVATIONS

THE MAHOMEDAN administration of justice during the post-Plassey days lost its purity because of the abuse of the administrative power of the time. The Committee of Secrecy in its Sixth Report, 1773, observed that the subjects of Bengal derived little protection or security and that the interposition of the governmental authorities had often been the cause of the perversion of justice. The degeneration of the judicial administration with the degeneration of the general administration of the post-Plassey days has been recorded almost in identical terms in the various knowledgeable English sources.¹ The influence of the Company's Agents began to operate in the administration of justice in Bengal, Bihar and Orissa in order to suit the commercial interests of the Englishmen there. The said influence could be keenly felt as early as during the regime of Meer Cosim and the second period of Meer Jaffier's government.² With the acquisition of the dewanee the power belonging to the Soubah of the Provinces of Bengal, Bihar and Orissa was totally and in fact vested in the East-India Company. Only the name and shadow of authority remained to him for a period.³ The Company, for all practical purposes, came into the place of the country Government by His Majesty's grant of the dewanee at Delhi.⁴ It was during this period of nominal control of the Nawab and *de facto* control of the East-India Company that the judicial administration of the country like its general adminis-

¹ Scafton: Letter on the Government of Hindoostan, 1763; Verelst: Instructions to Supervisors, 1770

² Francis Sykes, Member of the Council and of the Select Committee at Fort William, Resident at the Durbar at Moorshedabad, in his evidence before the Parliamentary Committee, 1772

³ The Governor and Select Committee at Fort William in their letter to Directors dated 16 January, 1767

⁴ Select Committee in their Consultations, 10 September, 1766

tration underwent a rapid degeneration.⁵ The acquisition of the dewanee had no immediate effect, it should be noted, on the condition of British administration in the ceded lands of Chittagong, Midnapur and Burdwan.

The difficulty of judicial administration, principally on the *mofussal* level, was one inherent in a foreign administration. The Fifth Report, 1812, of the Select Committee as well as the *Memorandum of the Improvements in the Administration of India during the last thirty years* submitted to Parliament in the year 1858 on behalf of the East-India Company on the eve of the British Parliament's acquisition of direct administration of British India expressly dwell on the various aspects of the position. The difficulties of the foreign administration were many. To begin with, the vast territories of Bengal, Bihar and Orissa had to be administered by a handful of Englishmen. It will be remembered that the grant of *diwani* as made in August 1765, in favour of the Company did not include the modern Orissa. At the time the expression 'Orissa' in the grant meant mainly the modern district of Midnapore. The modern Orissa was not acquired by the Company until 1803. According to an inquiry instituted in 1789 and conducted chiefly by calling upon the Collectors of districts for their opinions on the population of their respective jurisdictions, the population of Bengal and Bihar was 22 millions. Colebrooke's estimate was 25 millions in 1790 for Bengal, Bihar and Benares. Sir William Jones's figure was 24 millions for Bengal, Bihar, Orissa with Ghazipur, Benares, Jaunpur and part of Mirzapore.

According to Sir William Jones's estimate there could not be at his time fewer than thirty millions of 'black' British subjects in all India. In Crishnanagur, one of the 24 Collectorships, there had been found by an actual enumeration, a million and three hundred thousand native inhabitants.

In 1814, Bayley's investigations gave a figure of 39 millions. Francis Buchanan, too, arrived at the same figure of 39 millions by ascertaining the number of ploughs and taking five persons as dependant on one plough. We also learn that in the seventies of the eighteenth century the number of Englishmen engaged

⁵ Warren Hastings in his Letter of 3 November, 1772, to the Court of Directors

in carrying on the civil government of the Provinces of Bengal, Bihar and Orissa was less than 300, and of which personnel a number not exceeding 30 was allotted for the judicial administration over a populace of one crore and more.⁶ The administrators in the early days had also their business pre-occupations leaving to them little leisure for study and reflection.⁷ The experienced Englishmen, where any, would retire home leaving no wisdom for the successors to depend upon. The judges, again, at the lower court level, had no adequate equipment of legal knowledge. The erstwhile clerks of the Company were appointed superintendents, that is, judges, under the Regulation of 11 April, 1780. The judges of the courts at Burdwan, Dacca, Dijanpur and Patna thus though not equipped, each of them, according to Sir Elijah Impey in his letter to Dunning, had to decide, because of the vast territorial jurisdiction, on more property than the Supreme Court at Calcutta and all the Courts in Westminster Hall put together. The Europeans were sometimes ignorant of any of the provincial languages of the country, and could not incline to learn Sanskrit or Arabic in which languages laws of Hindustan were preserved and still being taught all over India.⁸ They had, consequently, to rely on Indian pundits and kazis whom they could not always trust as to their impartiality.⁹ At the instance of Warren Hastings, Halhed's *Gentoo Code* was prepared by the eminent Hindu scholars of the time. The Court Pundit of the Supreme Court at Calcutta read and corrected it, under the supervision of Sir William Jones, in the original Sanskrit and attested it as the correct exposition of the law.¹⁰ Similarly, Hamilton's *Hedaya* was compiled. Hedaya was in great use in the administration of justice

⁶ George Bogle, Commissioner of Lawsuits: Patna Appendix to Report of the Committee of House of Commons on Touchet's Petition, 1781

⁷ Shore's Minute on the Proceedings of the Government of Bengal, 10 February, 1790

⁸ Warren Hastings's letter to Lord Mansfield, March 2, 1774

⁹ Sir William Jones's letter to Sir J. Macpherson, Bart., May 6, 1786; his letter to Lord Cornwallis, 19 March, 1788: Lord Teignmouth's Memoirs of Sir William Jones, *Sir William Jones's Works*, London, 1807, Vol. II, pp. 84, 88, 140, 141 and 143; see also p. 27

¹⁰ Lord Teignmouth's *Memoirs of Sir William Jones*, *Sir William Jones's Works*, London, 1807, Vol. II, pp. 84 and 85

in Bengal in those days. In course of time several texts were written by Bengali gentlemen in the medium of Bengali, covering the Rules and Regulations that were passed from time to time.

The Hindu and Mahomedan law of interpretation, too, appeared perplexing to the European judges.¹¹ The inquisitiveness of the English judges together with their desire to attain consistency seem to have solved, in course of time, the difficulty experienced in interpreting Hindu and Mahomedan texts of law.

The Reports from the Judges of the Courts of Appeal and Circuit and the Zilla Magistrates that were submitted in the year 1802 in answer to the interrogatories circulated by Lord Wellesley, asking information on about forty heads pertaining to the administration of the country in its judicial, civil and revenue aspects, described the difficulties of the Company's administration of justice in the Presidency of Fort William in Bengal. The Moorshedabad Court of Circuit and Appeal submitted that no new rules were necessary for the expedition of determination of causes. Extension of jurisdiction of the Indian commissioners was found inadvisable. The Judges remarked that the introduction of the British government had caused further moral degeneration of the people governed and that education was considered as a necessary corrective. They observed that the costs of justice were rendered sufficiently heavy in all cases, and too considerable in small suits. A section of the judges and magistrates recommended granting of commissions to the zamindars as Justices of the Peace which conferment, they held, would persuade them to extend their co-operation and assistance to the administration in apprehending criminals whereas another section thought that such conferment would be a source of oppression to the lower classes of people in the community. According to Mr. Henry Strachey (later Sir Henry) the increasing terrorism created by the dacoits was partly due to the inefficient administration of justice.¹²

Sir Henry with all his authority of experience explained the

¹¹ *Hansard's Debates*, Third Series, Vol. XIX. 533

¹² Henry Strachey's Report dated 30 January 1802 to the Secretary to Government in the Judicial Department; Henry Strachey's Report dated 24 March 1803, to Registrar, Sudder Nizamut Adawlut, Fort William

point of view that the administration of justice was the least capable of a satisfactory execution by a batch of foreign judges, whether learned in jurisprudence or not, when they had no knowledge of the mind, the manners and the *mores* of the people under their jurisdiction. He would like to see the Indians installed in almost all the very high positions in the Government so long as they from those offices did not intend to subvert the British authority in India. He found the procedure adopted by the native commissioners satisfactory, and they could work, it was found, for the whole of the day, undisturbed by the heat or the crowd sitting under a peppul tree. Mr. Forbes, too, in Bombay worked as a judge for several months in Goozrat, about the year 1780, himself presiding, with the representatives of the several communities as co-adjutors, and found the type of court working very satisfactory. He was glad to note that no witness was ever accused of perjury, and no co-adjutor of his found or suspected guilty of corruption or partiality.¹³ The parties and witnesses habitually and religiously adhered to truth, the judges too, having had the power of discernment as opposed to the judges of the Anglo-Indian courts labouring in the dark.¹⁴ Under the impact of Western civilization the people here no longer considered the laws as a part of their religion. Law and morality ceased to have much connection. The dread of punishments denounced both in this world and in a future state for the commission of acts of immorality was no longer there. In the circumstances, education on Hindu and Islam patterns was considered as the only panacea for the evils.¹⁵ Indianisation of the judiciary was also advised. T. L. Strange, as a judicial commissioner and puisne judge of the Sudder and Foujdaree Adawlut, Madras, collected¹⁶ evidences on the superiority of the Indian Judges.¹⁷ The said Judge in his *Letter to the*

¹³ *Oriental Memoirs*, Vol. II, p. 2

¹⁴ Lt. Col. Sir William Henry Sleeman: *Veracity: Rambles and Recollections of an Indian Official*, London, 1844, Vol. II, ch. IX

¹⁵ Secretary Dowdeswell's Report on the General State of the Police in Bengal: Extract, Bengal Judicial Consultations, 29 September, 1809

¹⁶ T. L. Strange's Letter to the Govt. of Fort St. George on Judicial Reform, Madras, 1860, Appendix iv, p. xxix

¹⁷ T. Munro, 1807: *Select Records of East India House* II, 233, 234. A. Walker, 1813: *Select Records*, II, 189. J. Malcolm, 1813: *Evidence before the*

Government of Fort Saint George on Judicial Reform, Madras, 1860, further collected¹⁸ a volume of extracts of opinions¹⁹ held by authoritative persons all to the effect that by abolishing the native judiciary system in India and introducing the British they had wrought much ill among the people here.

On July 5, 1781, a Regulation of 95 Articles was passed amending and consolidating the pre-existing rules of civil procedure. Under Article 94 of this Regulation, the Sudder Dewanny and the mofussal dewani adawlut were required to openly declare the laws before the public, to publish them in Persian and Bengali translations, to affix the Regulation in some conspicuous part of the court-room to stay there for a month. The Regulation was in fact published in the English, Persian and Bengali languages. This Regulation continued in force till 27 June, 1787, when a revised code consisting of 91 Articles had to be

House of Commons, pp. 686, 689 1830: *Appendix to Report of the House of Commons, Judicial*, 1832, p. 518. W. Chaplain, 1821: *Select Records*, IV, 338. 1830: *Evidence before House of Lords*, pp. 179, 180. J. Briggs, 1822: *Select Records* IV, 907. 1830: *Evidence before the House of Lords* p. 290. Holt Mackenzie, 1826, *Appendix to Report of House of Commons, Public*, 1832, pp. 750, 751. Mountstuart Elphinstone, 1830: *Evidence before House of Lords* p. 156. R. Richards, 1830: *Evidence before House of Lords*, pp. 278, 281. C. T. Metcalfe, 1831, *Appendix to Report of House of Commons, Judicial*, 1832, p. 514. R. Clarke, 1832: *Evidence before House of Commons*, p. 92. Holt Mackenzie, 1832: *Evidence before House of Commons, Judicial*, 203. D. Hill, 1832: *Evidence before House of Commons, Judicial*, 307. W. Butterworth Bayley, 1832: *Evidence before House of Commons*, pp. 894, 934. T. Fortescue, 1832: *Evidence before House of Commons*, pp. 946, 949, 950. A. D. Campbell, 1832: *Evidence before House of Commons*, 995. J. Mill, 1832: *Evidence before House of Commons, Public*, pp. 407, 409. F. J. Shore, 1836: *Notes on Indian Affairs*, II, 159, 160. M. Cubbon, 1838: *Report on Mysore*, pp. 24, 25. G. R. Clerk, 1853: *Evidence before House of Commons*, 2350, 2351. J. F. M. Reid, 1853, *Evidence before House of Commons*, 2837. C. H. Cameron, 1853: *Evidence before House of Commons*, 2898. C. M. Caldecott, 1853: *Evidence before House of Commons*, 3611. J. B. Norton, 1853: *Administration of Justice in Southern India*, p. 95. W. Holloway, 1853: *Notes on Madras Judicial Administration*, pp. 20, 21, 22, 32 and 33.

18 T. L. Strange, *Letter*, Appendix I, pp. i — xii

19 Walker, 1813: *Select Records of East India House*, II, 179. W. Chaplin, 1821: *Select Records*, IV, 339-40. Mountstuart Elphinstone, 1823: *Select Records*, IV, 811-12. R. Jenkins, 1830: *Evidence before House of Lords*, p. 143. F. J. Shore, 1836: *Notes on Indian Affairs*, I, 139, 216, 217. J. Malcolm,

adopted and to be printed and published with translations. In 1793, again, a revised edition had to be passed and printed. This revised Regulation was Regulation XLI of 1793. In 1797 the Company's Government was further empowered, under 37 Geo. III. c. 142, by the Parliament of Great Britain, to enact a Code of Regulations governing the rights of person and property of those who were subject to the jurisdiction of the provincial courts. The Regulations had to be registered in the Judicial Department, formed into a regular code, and printed with translations in the provincial dialects. It was further provided in the year 1800 that the Province of Benares and the other Provinces and Districts to be made subject or annexed to the Presidency of Bengal were to be governed by the Regulations passed

- 1813: *Evidence before House of Lords*, p. 18. T. Munro, 1813: *Evidence before House of Lords*, p. 70. J. Stuart, 1808: *Fifth Report of Committee of House of Commons on Indian Affairs*, p. 576. T. Munro, 1813: *Select Records*, II, 105, 106, 110, 118—19. Mountstuart Elphinstone, 1819: *Select Records*, IV, 194, 197—98, 201—3. *Report enclosed by M. Elphinstone*, 1819: *Select Records*, IV, 209 and 212. W. Chaplin, 1819: *Select Records*, IV, 262, 271. R. Fullerton, 1820: *Select Records*, IV, 48. Bengal Government, 1826: *Appendix to Report of House of Commons, Public Department*, 1832, p. 359. J. F. Shore, 1836: *Notes on Indian Affairs* I. 4, 141. J. P. Willoughby, 1853: *Evidence before House of Commons*, Questions 2972, 2973. H. Strachey, 1802: *Appendix to Fifth Report of House of Commons*, p. 527, 539—41. C. F. Martyn, W. C. Blaquiére, A. Maclen, E. Thoroton, 1802: *Appendices to Fifth Report*, p. 551. W. L. Melville, 1832: *Evidence before House of Commons, Judicial*, 700. F. J. Shore, 1836: *Notes on Indian Affairs*, II, 162—63. G. R. Clerk, 1853: *Evidence before House of Commons*, 2332, 2334. F. N. Maltby, 1856: Communication of 7th October, 1856, made as Commissioner of the Hyderabad assigned Districts. Warren Hastings, 1813: *Evidence before House of Lords*, p. 100. R. Richards, 1830: *Evidence before House of Lords*, pp. 276—77. D. Hill, 1852: *Evidence before House of Lords*, 3232—33. F. J. Halliday, 1853: *Evidence before House of Commons*, 1891. E. Perry, 1853: *Evidence before House of Commons*, 2487—88. H. Strachey, 1802: *Appendix to Fifth Report* p. 534. H. Strachey, 1808: *Appendix to Fifth Report*, p. 589. N. B. E. Baillie, 1853: *Evidence before the House of Commons*, 3430, 3482. T. Munro, 1807: *Select Records* II, 233. J. C. Marshman, 1853: *Evidence before the House of Commons*, 3513. H. Forbes, 1857: *Minutes of Consultation of Madras Government*, 18 July, 1857. Madras Sudr., G. S. Hooper, T. L. Strange, and C. R. Baynes, 1858: *Report on Mr. Forbes's Memorandum*, 31st March, 1858. Calcutta Trades Association, 1858: *Petition to Bengal Government, Court of Directors*, 1814: *Select Records*,

or to be passed by the Governor-General and Council at Fort William in Bengal.²⁰ With the passage of time additional Regulations had to be passed, and during the period of 42 years, that is, between 1793 and 1834, both the years inclusive, as many as 675 Regulations were enacted forming the Bengal Code. On August 15, 1947, of these 675 Regulations 48 were in force in the Bengal Presidency. These 675 Regulations governed the establishment and procedure of the civil and criminal courts; regulated the general administration of the country; prescribed the manner of assessment and collection of revenue; dealt with occasional cases as they arose from time to time; did not enact much substantive law to be administered by the courts of judiciary established; retained Mahomedan criminal law up to 1832;²¹ allowed Hindu and Mahomedan law as personal laws of the communities in the matter of inheritance, social and religious institutions; prescribed the application of the law of justice, equity and good conscience in cases not expressly covered by Regulations; and absolved, in 1832, people not professing Mahomedan faith, if they so desired, from the operation of Mahomedan criminal law.²²

In view of the large mass of Regulations enacted each year it was thought advisable to prepare annually an explanatory index to the Regulations passed during the year, to be attached to the body of the Regulations collected in a volume.²³ The Regulations had to be printed in the English, Bengali and Persian languages separately with indices attached and to be distributed to the courts of justice and other public offices and officers and private individuals according to the direction of the Governor-II, 238. 1826: *Appendix to Report of House of Commons, 1832, Judicial*, p. 357. Mountstuart Elphinstone, 1830: *Evidence before House of Lords*, p. 154. Madras Native Association, 1852: *Petition to Parliament, Appendix to Report of House of Lords, 1852-53*, p. 213. G. R. Clerk, 1853: *Evidence before House of Commons, 2194*. C. Wingfield, 1858: *Letter to Government of North-West Provinces*, 13 December, 1858. Walter Elliot, 1859: *Minute of 26 January, 1859*. P. W. Legeyt, 1859: *Letters to Sir Charles Trevelyan on Judicial Reform*, pp. 25, 26. T. Pakenham, T. C. Robertson, W. Fane, H. T. Prinsep, R. M. Tilghman, W. H. Macnaghten, 1831: *Appendix to Report of House of Commons, Public Department, 1832*, p. 737.

²⁰ Section 20 of 39 and 40 Geo. III. c. 79

²¹ Articles 47, 50, 74 and 75 of Reg. IX of 1793

²² Article 5 of Reg. VI of 1832

²³ Article 10 of Reg. XLI of 1793

General in Council.²⁴ Ten copies were to be sent to England as early as possible.²⁵

In 1793 for the conveniences of suitors in the courts of civil judicature the institution of professional lawyers was created. Prior to this date, private agents conducted civil suits on behalf of the principal parties. It was considered desirable to create a Bar which would help the public consisting mostly of illiterate persons. Owing to the advent of a foreign rule, introducing juridical forms and procedures alien to the instincts of the native population, the need of an institution fostering the growth of a more or less trained personnel of professional lawyers was keenly felt. Regulation VII of 1793 sought to provide for the want. This Regulation, in a way, was the precursor of the present law in British India governing admission into and regulating the conduct of the Bar. Under the Regulation, the pleaders before admission had to take an oath binding them to a faithful discharge of their duties. The pleaders professing Mahomedan faith were required to be sworn half-yearly to the truth and fidelity of their duties they had actually discharged. This retrospective oath was in those days considered to have imposed a greater obligation upon the conscience of the Mahomedans.

The pleaders of the civil courts were to be appointed by the Sudder Dewanny Adawlut.²⁶ They were to be selected, at the earlier stage, from among the students of the Mahomedan College, Calcutta, Hindu College at Benares, and from any other persons, Mahomedan and Hindu, duly qualified by character and education and study of Mahomedan and Hindu laws.

The Bar library of those days consisted mostly of a number of printed copies of the various Regulations that were from time to time passed by the Governor-General in Council at Fort William in Bengal. Such copies were rendered accessible to the private seekers of law as well. The printed Regulations of the Government, moreover, determined the nature of relationship between the counsel and his client. These Regulations provided, among other things, that the pleader could be engaged by the parties by a small retaining fee to be ultimately rewarded

²⁴ Article 11, *ibid.*

²⁵ Article 12, *ibid.*

²⁶ Regulation 7 of 1793

for his labour by a certain percentage of the amount sued for, which was to be awarded to him to be received from his client, or from the opposite party as determined by the decree.

As early as the late eighteenth century the Indian pleaders in the district civil courts of the Judge-Magistrates were found very useful in the administration of justice. The merits of the case were brought before the notice of the trying judge, and in this way justice was expedited.²⁷ The vakils were very dutiful in their dealings with clients.²⁸ In those days, as now, no one but the public officers, pleaders and candidates for office possessed a general knowledge of the Regulations. Even the zamindars, talukdars, farmers of revenue, and the merchants tried to know only those Regulations with which they were more immediately concerned.

The legal practitioners were found in 1802 to have been well conversed in law. The Company's Regulations were however known, as noted before, only to the vakils, the ministerial officers of the several courts and to a few of the principal landholders of the country. The personal laws of the Hindus and Mahomedans were still familiar to them. The amount of earnings of the professional lawyers in the courts was found lucrative enough to draw a large number of men of learning and character to the Bar. Ambitious men were trying to overcrowd the Bar.²⁹

The Regulations were often translated into Persian and Bengali both by Englishmen and Bengalees whether appointed by the Government or as private persons permitted by the Government. A translation *verbatim et literatim* was undesirable, it was pointed out, because such a rendering would be unintelligible to most of the people.³⁰ Sir Elijah Impey's Code

²⁷ Answers from H. Strachey, Judge-Magistrate, Midnapore, dated 30 January, 1802, to the Interrogatories of Lord Wellesley

²⁸ Answers from T. Pattle and R. Rocke, Judges of Moorshedabad Court of Appeal and Circuit dated 26 January, 1802, to the Interrogatories of Lord Wellesley

²⁹ T. Pattle and R. Rocke in their Report dated 26 January, 1802, as Judges of the Court of Appeal and Circuit of Moorshedabad in reply to the Interrogatories of Wellesley. Answers of E. Thompson, Judge and Magistrate of Burdwan dated 9 March, 1802, to the Interrogatories. See also other such Reports in Firminger

³⁰ Section 18 of Regulation XLI of 1793

was translated into Persian by William Chambers in 1781, and into Bengali by Jonathan Duncan in 1783. The English editions were also occasionally translated in Hindi. But such rare copies of translation did not help the people much to understand the laws of the time. The Regulations were not always available even in their original English edition. Thus, P. M. Wynch observed in his letter to the editor of the *India Gazette* that there was a very large and numerous class of persons out of the service³¹ deeply interested in the Regulations, to whom the massy volume which contained them had not been accessible. Before the re-publication of the Regulations, at the Baptist Mission Press, a complete set was not obtainable at all even in the highest native tribunal of the country, and the business of the officiating judge of the Sudder Dewanny Adawlut, Mr. Smith, was brought to a stand for want of the same, until he obtained them by special application to the office of the Secretary of the Judicial Department. They were then procurable at the missionary press but the expense was, to many, a serious objection.³¹

A rough search reveals that during 1793 and 1849 more than forty law books were written in Bengali.³² The Indian authors published their works under all sorts of titles possible. Babu Mahesh Chandra Bandyopadhyaya, under the direction of Babu Bhawani Prasad Chattopadhyaya, made in the medium of Bengali a Collection of the Civil Acts comprising civil laws, their explanations, circular orders and other Regulations governing revenue collection.³³ The work contained in it important Regulations and Acts that were passed during the fifty years 1793-1843. The contents show that in the year 1843 the people of Bengal were being governed by about 125 principal Regulations and Acts. In 1851 another collection³⁴ of the civil laws was made through the medium of Bengali. The author was Babu Akshaya Chandra Brahmachari, Professor of Law, Chinsurah College. The work comprised the Regulations, Acts, their explanations, Cir-

³¹ P. M. Wynch : *Letters on the Compilation of a Judicial Code*, 1832, p. 81

³² For the work done during the Company's period in the matter of rendering the Hindu and Mahomedan laws in English, Persian, Bengali and Hindi, see Morley's *Analytical Digest*, Vol. I, 1850, Introduction

³³ *Dewani evam Collectori Ainer Samgraha*

³⁴ *Dewani Jnan Ratnakar*

cular Orders, and reports of important cases decided in the Sudder Court. The contents included Rules, Regulations, and Acts that were passed during 1793 and 1851 and were in force at the time of the compilation. According to this book, the principal Regulations and Acts that were in force in 1851 numbered about 170. Under the heading *constructions*, the work gave a collection of the rulings of the Sudder Dewanny Adawlut covering the period 2 May, 1799, to 24 February, 1843. The language of the second book showed a remarkable improvement upon that of the former. H. P. Forster's book, rendering the Cornwallis's Code in Bengali in 1793, proved, however, a failure.

Acts were gradually superseding the Regulations. Thus, according to C. D. Field : *Regulations of the Bengal Code*, 1875, in October, 1875, only 79 Regulations remained wholly or partly in force of which 78 were applicable to the Bengal Presidency in October, 1875.

The Manuscript Collections in Calcutta University Library, P. G. Arts, as well as the 170 letters, chiefly concerned with administration and written during the period of April, 1779, and May, 1820, that have been collected by Dr. S. N. Sen and published by the University of Calcutta in 1942, will astonish us in these days to learn how serious matters could be ably expressed in elegant Bengali even in those days when it was not so rich as it is to-day. The *Collections Serial No. 2495: Two Petitions to Courts, 1689 A.D.* of the Calcutta University MS Library deserve our special attention.³⁵ These were petitions addressed to the civil and criminal courts respectively and dated 22 *Ashar*, 1096 B.S.³⁶ and 7 *Shrawan*, 1097 B.S.³⁷ They were drafted in simple Bengali on behalf of litigants of Bishnupur in the present district of Bankura in West Bengal. Such and other materials conclusively show that Bengali in those days in Bengal was a better medium of legal transactions than English to the Englishmen in England. English language is not even to-day as suitable as the continental languages like French for the task of formula-

³⁵ See also Calcutta University MS Library : Collection : Serial No. 4052 : Law Points Translation in Bengali language, of the British Government, dated 1793 A. D.

³⁶ Seram Kanta Chanda of Bishnupur vs. Sada Ram Mahanta of Indus

³⁷ Rama Kanta Chanda vs. Manik Ray

tion of generalities with a high degree of precision and lucidity.³⁸

The utility and importance of establishing a free and direct communication with the people of India led the authorities in England to encourage the spread of the English language in the territories under their control. Further, a dissemination of English ideas among the people here was expected to create among the Indians a sense of esteem and respect for the ruling nation.³⁹ The Government as yet did not find time to devote its attention to any appreciable extent to the cause of education in the Indian Provinces under its control. The apathy of the Government in this respect caused a general suspension of culture in the country. Only the village schools and *tols*, where there were any, were functioning under the patronage of the Indian public. It was in the first quarter of the 19th century that the Company's Government decided to effect a revival of Indian culture and learning after its general suspension for more than half a century.⁴⁰ The Government therefore allotted a part of its revenue for the purpose, and the policy to be adopted had been formulated in broad outlines.⁴¹ The Court of Directors further having come to know that in the Sanskrit language there had been excellent treatises on ethics, law and administration whose study might well equip the Indian youths who might prepare themselves for judicial appointments under the Company's Government, advised the Government here to encourage some of the Company's servants to devote themselves to the study of the Sanskrit language and to appoint professors of Sanskrit therefor.⁴²

The Government was next determined to follow a systematic course of proceeding in the matter of public education. It was suggested that the aim of the policy of public education should be not merely to make the Indians expert agents of the administration of the country but also to enlighten their minds, to raise their character, to strengthen their understanding, to purify their heart and to enable them to take advantage of the Western

38 See Dr. C. K. Allen: *Law and Orders*, 1945, pp. 218-19

39 The Court of Directors' Despatch to Madras, 16 February, 1787

40 Minute of Lord Moira on the Judicial Administration of the Presidency of Fort William, October 2, 1815, paragraphs 129-31, 134-5

41 Section 43 of the East-India Company's Act of 1813

42 Paragraphs 22 and 23 of the Letter from the Court of Directors to the Governor-General of Bengal, June 3, 1814

sciences and to make contribution to the store of wisdom of mankind. As to the means of instruction, however, opinions differed. Some would support teaching of the English language; others would prefer the introduction of Western science through the medium of the mother tongues of the people. The latter school proposed to instruct teachers and translators so that useful works in the European languages might be rendered into the provincial languages for publication and distribution. It was realised earlier that the acquisition of a foreign language was not so difficult to a man of learning and as such English teachers could sooner be qualified to instruct Indian students in the medium of Indian languages than Indians to receive education through the medium of English.⁴³ But suggestions in favour of the Indian languages being the media of instruction were not accepted. It was thought that the introduction of English as the medium of Government transactions, both judicial and administrative, would impel the Indians in their own private interest to the adoption thereof.⁴⁴ Unfortunately for India, the General Committee on Public Instructions set up by the Government of India to decide on the policy and procedure as regards public education were divided as to the subject-matter and also the medium of instruction.⁴⁵ The Hon'ble Mr. T. B. Macaulay observed that the Indian dialects lacked in literary and scientific information and were also in other respects unfit for the purpose of translating valuable European works into them, unless enriched from other quarters in course of time. Mr. Macaulay thought that the Indians could not be educated by means of their mother tongue, and that some foreign language had to be imported. In that case the claim of English, according to Mr. Macaulay, again, was the best inasmuch as, in addition to its intrinsic value, it was the language of the ruling class, widely understood by the higher class of Indians at the seats of government and spoken by two rising

⁴³ Holc Mackenzie: Note, dated 17 July, 1823, Territorial Department, Revenue Consultations, 17 July, 1823, No. 1

⁴⁴ C. Grant's Observations on the State of Society among the Asiatic Subjects of Great Britain, etc., August 16, 1797

⁴⁵ Letter No. 2094, dated January 22, 1835, from the General Committee of Public Instruction to the Government, paras. 7, 10, 23, 25, 30 and 31

communities near the shores of India, namely, those of Australia and South Africa. With a limited fund at the disposal of the Government it was proposed to form a class of Indians who would be interpreters between the English and the Indians — a class of persons English in outlook, intellect and opinion, capable by virtue of their learning to render the Indian dialects fit media of instruction for the masses at large.⁴⁶ The Governor-General Lord Bentinck concurred with the Minute of Mr. Macaulay and the policy of the Government was finally settled as proposed by Macaulay.⁴⁷ The introduction of English gradually relieved the servants of the Government of the onerous task of learning the language of the provinces in which they were employed and without which they could not become competent administrators.⁴⁸ Soon after the Government realised that the advanced works in European literature could fully benefit only those who read them in their original sources, and that textbooks in Indian languages could be produced only for the ordinary institutions and not at the higher stages, and that it would take a long period to render a good number of books obtaining in European languages in the Provincial dialects of India.⁴⁹

Necessarily English became the principal medium of instruction⁵⁰ and has remained so in India till to-day. The Court of Directors subscribed to the Governor-General's resolution of 7th March, 1838, whose object was to promote European Science and Literature among the Indians and at the same time recommended the Government here to encourage translations of European works into Indian dialects.⁵¹ Though the Court of Directors thus did not expressly insist on it, English became ultimately the

⁴⁶ Minute by T. B. Macaulay, February 2, 1835

⁴⁷ Lord Bentinck's Resolution, March 7, 1835. Suggestions of the Committee of Public Instruction, 11 April, 1835

⁴⁸ Minute of 1828 by Sir J. Malcolm, Governor of Bombay, quoted, *Selections from Educational Records*, Part I, 1781-1839, Bureau of Education, India

⁴⁹ Minute by the Right Hon'ble Lord Auckland, the Governor-General, November 24, 1839. Sir Charles Wood's Despatch of 1854

⁵⁰ Paragraphs 4-8, Despatch from the Court of Directors to Madras Government, September 29, 1830

⁵¹ Despatch of the Court of Directors to the Government of India, January 20, 1841

medium of instruction.⁵² The ideal position would be to produce Indians — a choice few — who would possess a good knowledge of their own dialects and of English and would be thus capable to render incalculable benefit to the country. The Provincial dialects would be the media of instruction; English would furnish the matter of instruction; Sanskrit, Arabic and Persian would help enrich the provincial dialects with strength, form and beauty and also with matter in cases where possible.⁵³ The wealthy classes in the mofussal, the pundits and the moulavis of India were willing to receive the treasures of European learning through the medium of their own dialects. They objected to English being used as the medium.⁵⁴

English having been the medium of instruction in British India, the large masses of the country have been deprived of the European store of knowledge which would be accessible to the people had the provincial dialects been used, as the media.⁵⁵ In that case the Indian pundits and moulavis and the English professors of the schools and colleges could produce justly translation works for the benefit of the people. Such translations might be in the first instance correct if not elegant.⁵⁶ Even in the accepted system the Government's apathy was responsible for the non-production of any translation works worth the name. The people of the country continued to feel the inconveniences resulting from English as the medium of instruction. The desire of the parents to send their children to English schools at an early age was to secure for them public employment.⁵⁷ It was admitted by the Government that students taught in their own dialects were better equipped in reasoning and understanding than those taught in English.⁵⁸ English education exacted great labour

⁵² The Court of Directors' letter to the Governor-General in Council, 18 February, 1824

⁵³ Captain Candy, Superintendent of the Poona Sanskrit College; Report for the year 1840

⁵⁴ F. Boutros: An enquiry into the System of Education most likely to be generally popular in Behar and the Upper Provinces, Serampore, 1842

⁵⁵ Minute by Colonel Jervis, February 24, 1847

⁵⁶ F. Boutros: An enquiry into the System of Education, etc.

⁵⁷ Minute by Juggonath Sankersett, May 1, 1847, concurred in by Framjee Cowasjee and Mohammad Ibrahim Muckaba of Bombay

⁵⁸ Letter from the Government of Bombay to the Board of Education, Bombay, 5 April, 1848. Minute by Colonel Jervis, 24 February, 1847

to master the language; knowledge acquired was, consequently, comparatively little. English education, further, created a class of persons different from the community as a whole.⁵⁹

While the said policy of education was adopted by the Government, the transaction of the court affairs was not always held in English. The Select Committee submitting the Fifth Report in 1812 found, at the time of their writing, that depositions before the magistrates were written commonly in the Bengali and Persian languages and scripts on separate papers. The old order requiring a record of all the proceedings of the magistrate as regards admission of complaints and awarding of decrees thereupon to be kept in English had been practically inoperative and the Select Committee regretted this desuetude with the remark that its enforcement would effect an accumulation of records which would afterwards help a retrospective study of the sociology of the people in question.⁶⁰ The Government, however, did not follow any uniform policy in the matter. It was soon proposed that English should replace Persian as the court language, if any foreign language was to be adopted at all. The boys then receiving English education were found to have mastered the English language. And inasmuch as Persian the then court language was the mother tongue of nobody, neither of the judges, nor of the pleaders, nor of the parties and witnesses, it was deemed proper that Persian should be replaced by English.⁶¹ Persian though not the mother tongue of anybody was nevertheless widely understood among the educated classes of the day.⁶² A section of the Indian public were against the introduction of English as the official language, on the ground that English being given such preference people would be tempted to teach their boys English for service with the result that such education would induce the boys to profess religions and practise manners not sanctioned by the orthodox Hindu religion. They asserted that both the provincial languages of India and English should have been simultaneously maintained as the

⁵⁹ *Banga Darshan*, Bhadra, 1287 B. S. (Aug.-Sept., 1880)

⁶⁰ *Fifth Report*, Firminger's Edition, Volume I, p. 68

⁶¹ *Samachar Durpon*, January 26, 1828

⁶² First Number of the *Mirat-ul-Ukhbar* of Raja Rammohun Roy

languages of the Government offices and the courts of law in order to avoid conversion of Hindu boys into other religions.⁶³ The utilities of learning the mother tongue as the medium of instruction and official and social transactions had been no doubt urged to the Government from time to time by the individuals here and there, but there had been no systematic agitation in favour of the re-introduction of the principal languages. The individual appeals, however, sometimes left no point untouched describing the advantages which would accrue from having the provincial languages as the media of all transactions, administrative, judicial, educational, political, social, economic and cultural.⁶⁴

In pursuance of a policy which was not clearly defined, the Governor-General in Council was, in 1837, empowered to abolish Persian as the court language in any part of Bengal, Bihar and Orissa or in the whole of the Provinces.⁶⁵ The Deputy Governor of Bengal with delegated authority issued a circular order dated 9 February, 1838, directing the heads of offices to introduce Bengali and other local dialects in the offices of the respective districts. The officers were given 12 months to complete the process. Under Circular Order dated 2 April, 1841, it was directed that the language of the court would have to be *via media* between the popular tongue and the refined and elegant style of the pundits for the convenience of the public in general. The Circular Order of November 23, 1838 directed that the documents to be despatched to the Assistant of the Agent of the Governor-General stationed at Hajaribagh or Lohardaga had to be written in Urdu. It was further ordered under the Circular Order of July 5, 1839, that the orders and other papers of the Sudder Dewanny and Nizamut Adawluts could be written in the Urdu language and Persian script. Under the same Circular Order, the documents and papers if written in Persian or Bengali and had to be transmitted to the Sudder Dewanny and Nizamut Adawluts need not be translated into Urdu. But in criminal cases excepting those concerning *thuggee* if not already written in Urdu or Persian, the documents and papers had to be rendered into Urdu for submission to the Sudder Nizamut

⁶³ *Samchar Durpon*, 6 October, 1835

⁶⁴ Rabindranath Tagore: *Essay on Siksha* — (Education)

⁶⁵ Section I of Act XXIX of 1837

Adawlut. The documents in Oria or the Mug language had to be translated into Urdu. The civil and criminal courts would accept documents written in either of the three languages, namely, Urdu, Bengali, and Persian. When both Bengali and Urdu were in currency, the courts would accept documents written in either of these two languages. The Government officers in the Bengal districts had to read and write in Bengali. In their intercourse with officers of other districts Urdu would be the medium. * In the Urdu-speaking districts the courts and officers were directed to write Urdu in the Nagri scripts and to report on 1st January, 1840, the effect thereof to the Sudder Dewanny Adawlut at Calcutta. The Englishmen had to receive judgment and orders from the Sudder Dewanny Adawlut in Persian or other court languages and not in English for translation into which the Englishmen had to pay separately and appoint separate men of their own.⁶⁶ English however later replaced the country languages as the language of transaction of the court and office affairs.

Since the year 1835, the drafts of proposed laws had been published with a view of inviting the opinion of the public thereon. At the time there were no gazettes in the languages of the country enabling the people to express their sentiments in regard to the provisions of the drafts while under the consideration of the Legislative Council. The official gazette in the English language was the only medium for the purpose.

The Government some years after adopted measures for the regular publication in the vernacular languages of the drafts of laws and its own orders and those of other authorities. In 1840, the publication of the Government Gazette in Bengali was commenced publishing drafts of proposed laws in the Bengali language and thus giving the people of Bengal an opportunity to read the provisions before they became law and impress their opinion thereon. All the drafts however were not published in Bengali. Sometimes drafts were published in Bengali after the time for the second reading had passed away. The members of the British Indian Association in a petition on behalf of the Association addressed to the Governor-General of India in Council under the signature of Debendra Nath

⁶⁶ *Dewani evam Collectori Ainer Samgraha*, pp. 274-77

Tagore, as honorary secretary of the Association, while expressing their satisfaction on the measure of publishing the provisions of the drafts in the Indian languages, complained against the very little amount of time that was left at the disposal of the people of the Province in order to offer criticism on a proposed measure. The petition referring to the 12 drafts that were published in the Bengali Gazette in the year 1851, observed that on an average "there was an interval of but forty days between the appearance of the drafts in the vernacular and the dates on which they were to be read by the Legislative Council for the second time, and, on approval, passed into law". The petitioners suggested that three months might be allowed to the people of the country to frame and submit their representation to the Government in view of the distance of the interior parts of the country from the seat of the Government and of the peculiar nature of the work of making representation which required study, reflection and discussion by the persons interested.

A reference may herein be made to the Committees and the Commissions that were set up for the compilation or codification of laws during the Company's regime.

On 18 March, 1773, when the Sudder Dewanny Adawlut was opened, the members of the Sudder Court constituted three distinct commissions, two consisting of the officers of the two Sudder Adawluts and a third of ten of the most learned pundits to prepare a complete code of laws. The code was to be a digest of the usages and customs in cases of revenue and agreeable to the laws and tenets of the Mahomedans and the Hindus.⁶⁷

Most eminent Hindu scholars of Bengal and Bihar were invited to Fort William in Calcutta and a committee of eleven pundits, one being added to the original number of ten, was formed. This Hindu Law Committee began their work in the month of *Jaistha* of 1180 B.S. (May 1773) and finished their work in *Phalgun* of 1182 B.S. (Feb. 1775). The *Gentoo Code* (*Hindu Code*) was compiled in Sanskrit under the title *Vivadar-nava Setu*, rendered into Persian, and translated into English from the Persian version by Nathaniel Brassey Halhed under

⁶⁷ Letter from the President and the Council in Bengal for the Department of the Revenues to the Court of Directors, dated 25th March, 1773.

the title *A Code of Gentoo Laws or Ordinations of the Pundits*.⁶⁸ This Code contained both substantive and adjective laws, civil and criminal. The names of the eleven Brahmin pundits compiling the *pootee* in Sanskrit are given below from the English version.⁶⁹ For the pundits' reference to *Warring Hastings*, in their preface to the *pootee*, see the *Gentoo Code*. As to further work on Hindu law in Sanskrit and English see Section VIII, *ante*.

After the Hindu Code was accomplished, a number of the principal Mahomedan professors in Bengal⁷⁰ were employed in translating from the Arabic into the Persian tongue a commentary upon the Mussalman law called the *Hedaya* or *Guide*, a work held in high estimation among the people of that persuasion. The English version of that commentary was later known as Charles Hamilton's *Hedaya*. The translation was originally entrusted to Anderson and Hamilton by Warren Hastings. It was, however, done by Charles Hamilton. All the four volumes of Hamilton's translation appeared in London in 1791.⁷¹ The *Futawa Alumgiri* was first compiled in Arabic. It was translated into Persian at the desire of the Alumgir's daughter Zeb-un-nisa. The Urdu translation of the *Futawa Alumgiri* was done by Sh. Amir Ali and printed at Lucknow.⁷²

⁶⁸ Letter from the President and the Council in Bengal for the Department of the Revenues to the Court of Directors dated 15th March, 1774. See also the Letter from Warren Hastings, Esq. Governor-General of Fort William in Bengal, to the Court of Directors of the United Company of Merchants of England trading to the East-Indies, dated Fort William, 27 March 1775

⁶⁹ Ram Gopaul Neeayalunkar, Beereeshur Panchanun, Kishen Juin Neeayalunkar, Baneeshur Beedyalunkar, Kerpa Ram Terk Siedhaut, Kishen Chund Sareb Bhoom, Goree Kunt Terk Siedhaut, Kishen Keisub Terkalungkar, Seeta Ram Bhet, Kalee Sunker Beedyabagees, Sham Sunder Neeay Siedhaut (*Gentoo Code*, London, 1775, page lxxvi)

⁷⁰ For the names of the composers of the Persian Version, *Hedaya Farsee*, see p. xi of the Introductory Address by the Composers

⁷¹ *Hedaya* or *Guide* translated by order of the Governor-General and Council of Bengal by Charles Hamilton, London, 1791; see the Translator's Preliminary Discourse, xxxii-xxxiii, xliv-xlv and lxxxviii; as to the authorship of the original Arabic version of the *Hedaya* see Neil B. E. Baillie, *Moohummudan Law of Sale*, London, 1850, Preliminary Remarks, pp. xv and xvi; see also Harington, *Analysis*, Calcutta, 1805 and 1809, Vol. I, 237

⁷² As to the costs and the personnel of Alumgir's Law Commission, see Muhammad Basheer Ahmad, *The Administration of Justice in Medieval*

The Company's Government did not however proceed much further in the like attempt at codification. The proceedings of the Sudder Dewanny and Nizamut Adawluts also show that their Lordships relied for the determination of causes on the original texts proper rather than on any digest as such.

The Governor-General in Council was empowered to pass such regulations as were to be found necessary for the internal government of the British territories in India. The increasing legislative powers of the different provincial governments from 1813 onwards were responsible for the growth of a heterogenous system of laws as enacted by the Regulations of the different Provinces.

The judges of the Supreme Court at Fort William referred to the then Governor-General, in the year 1829, to this variety of sources resulting in the diversity in the British-Indian law. By 1829, thus it could be said that for this diversity as many as about two dozen of sources were responsible. The range of the sources extended from the English common law to the private and public international law.⁷³ Mahomedan criminal law had been superseded to a great extent by the Regulations made by the Legislatures of Bengal, Bombay and Madras containing very different and sometimes irreconcilable provisions. No less than 26 Regulations were passed respectively by Bengal, Bombay and Madras prescribing for the same kind of offences.⁷⁴

The power of the judges of the Provincial Courts of Appeal,⁷⁵ of the munsiffs,⁷⁶ Sudder Ameens,⁷⁷ of the judges of the Sud-

India, 1941, pp. 41-43; Neil B.E. Baillie, *Moohummudan Law of Sale*, London, 1850, Preliminary Remarks; and Harington, *Analysis*, Vol. I, 243-45

⁷³ *Hansard's Debates*, Third Series (1833), Vol. XVIII, 729, 777-778. See also page 212 of the *First Report of the Second Law Commission*

⁷⁴ The Members of the First Law Commission in their prefatory address to the Governor-General in Council dated 14 October, 1837, while forwarding the printed copy of the Indian Penal Code which had already been laid before the same authority on 2 May, 1837

⁷⁵ Section 21 of Regulation III of 1793

⁷⁶ Section 32 of Regulation VI of 1793

⁷⁷ Section 5 of Regulation V of 1831; Section 3 of Act XXVI of 1852; Section 9 of Regulation VII of 1832

der Dewanny Adawlut,⁷⁸ and of the Supreme Courts⁷⁹ to administer justice, equity and good conscience in cases where no specific law existed⁸⁰ resulted in the judges resorting to English law books for their guidance.⁸¹ The decisions of the British courts in parallel cases were also taken as guidance.⁸² Thus for all practical purposes the principle of justice, equity and good conscience meant in the British-Indian courts the principles of the English law if found applicable in an Indian atmosphere.⁸³

In the realm of procedure in the civil courts, too, different procedures were followed in the different courts or even in the same court for its different jurisdictions or for different types of suits or for the different modes of trials of the same suit. In Bengal alone about a dozen systems of civil procedure were in force prior to the enactment of the Code of Civil Procedure in 1860.⁸⁴ According to the *Introductory Notes to the Proposed Code of Procedure for the Courts of Civil Judicature in Bengal*, the Commissioners of the Second Law Commission observed that at the time there were six different systems of procedure in Bengal, besides the one for the Court of Small Causes at Calcutta: four in the Supreme Court, corresponding to its common law, equity, ecclesiastical, and admiralty jurisdictions; and two in the Courts of the East-India Company, one for the regular and the other for summary suits.

The co-ordinate authority desired a unification in the laws, substantive and procedural.⁸⁵ The only way of checking the process of borrowing English rules was to substitute for the foreign rules a system of written law for the British India.⁸⁶

⁷⁸ Section 93 of Sir Elijah Impey's Regulation of 5 July, 1781; Section 31 of Regulation VI of 1793

⁷⁹ Clause 18 of Charter of the Supreme Court, 26 March, 1774

⁸⁰ Letter from the President in Council of Fort William to the Court of Directors, 3 November, 1772

⁸¹ *Per* Sir James Stephen: *Supplement to the Gazette of India*, May 4, 1872, p. 535

⁸² Sir Barnes Peacock: *Saroop vs. Troylokh Nath*, (1868), 9 W. R. 230, 232

⁸³ *Waghela vs. Shekh Masludin* (1887) 14 I. A. 89, 96

⁸⁴ Whitley Stokes: *Anglo-Indian Codes*, Vol. II, pp. 381, 383

⁸⁵ *Hansard's Debates*, Third Series, Vol. XIX, pp. 531, 533,

⁸⁶ Despatch from the Secretary of State for India to the Government of

£ 170,100 without furnishing the Indian population with any code of importance whatever.⁹⁷ This disappointment on the part of the public was based more on the non-incorporation till date of the Commission's recommendations in the form of statutes than on the inaction of the Commissioners themselves. It has to be observed that besides the Draft Indian Penal Code, the first Indian Law Commission did a considerable amount of work as will appear from the Special Reports presented to Parliament in 1842, 1844, 1845 and 1847 in pursuance of 3 and 4 Wm. IV. c. 85, s. 54.

The First Indian Law Commissioners from time to time recommended in a series of Reports extensive alterations in the Judicial Establishments, Judicial Procedure and Laws established and in force in India, and set forth in detail the provisions which they proposed to be established by law for giving effect to certain of their recommendations to which no final decision had yet been given. Thus a variety of subjects, the law of prescription and limitation, beside the criminal law, for example, was taken up and reported upon by the First Law Commission.

The Second Commission was constituted by Her Majesty's Command dated 29 November, 1853, and reconstituted on 17 March, 1854, to examine and consider the Recommendations of the First Indian Law Commissioners and the enactments proposed by them for the reform of the Judicial Establishments, Judicial Procedure and Laws of India, and such other matters in relation to the reform of the said Judicial Establishments, Judicial Procedure and Laws as might, by or with the sanction of the Commissioners for the Affairs of India, be referred to them for their consideration. This (Second) Law Commission was required to certify to Her Majesty within three years after the twentieth day of August, 1853, what they shall have done in the 'premises'.

The Second Law Commission submitted their first report in 1855. The second report of this Commission was submitted on 13 December, 1855. Their third and fourth reports were submitted on 20th May, 1856. The reports on the codes of civil and criminal procedure were submitted by this Second Commission to Her Majesty's royal considerations. The Draft

⁹⁷ J. B. Norton: *The Administration of Justice in Southern India*, 127-29

Indian Penal Code was passed into law in 1860. India did not resent codification.⁹⁸ The representative Indian minds resented however the importation of foreign laws and procedure.

The British Indian statutes, civil and criminal, substantive and procedural, had been enacted without owing their origin to the institutes, texts or their commentaries of the pre-British India or to the post-Plassey textbooks of Hindu or Mahomedan law. Though theoretically conscious of the importance of the relations of the Indian customs, usages, laws and institutions to the new laws to be enacted for the governance of the people here, the Law Commissioners factually could not do justice to the said relation. The Commissioners working in England even resisted the changes introduced by the Government of India to the Draft Bills prepared by the Commission. The result was that even where a few vestiges were allowed to remain as relics of the ancient laws of the Indians, they assumed the English garb in a manner which rendered them observable only to the eyes of a veteran scholar and that also only after a good deal of labour and research.⁹⁹

One principal defect in the British administration of justice in the Provinces of Bengal, Bihar and Orissa had been its expensiveness. Under the Mughal system a fourth part of the value of the property recorded in a court of judicature was to be appropriated as the King's due as the dispenser of justice. The Company's Government in its early days abolished this iniquitous imposition and substituted instead a small percentage fee on the institution of the suit. This institution fee was suffered to continue till the establishment of the dewani adaw-luts and courts of appeal in 1793 when under the new system the institution fee was abolished altogether and when the suitor in a civil cause had to pay no more than the pleader's fees and the actual costs of summoning their witnesses. This facility

⁹⁸ Sir Sayyed Ahmed's *Memorandum*, recorded in the Abstract of Proceedings of the Legislative Council of the Governor-General dated 26 January, 1882, pp. 63 and 64

⁹⁹ *Banga Darshan*, Pous, 1279 B. S. (Dec.-Jan. 1872-73); *Banga Desher Krishak* (Peasants of Bengal); the Report of the Fourth Indian Law Commission dated 15 November, 1879; Whitley Stokes *Anglo-Indian Codes* Vol. I, 1887, Introduction to the Contract Act, 534; Acharyya, *Codification in British India: Physiognomy of the history of Codification in British India*, 1914, 40-41

Thus at the time of the renewal of the Charter of the East-India Company in 1833 it was realised that British India needed very much a code of laws which might introduce a uniform system of law and procedure throughout the British possessions in India reducing the scope of judicial legislation in the name of justice, equity and good conscience. This led to the appointment of a Law Member of the Council of the Governor-General.⁸⁷

The first Law Member, T. B. Macaulay, assumed charge of his office on 27 June, 1834. The statute of 1833 provided for the appointment of a Law Commission and from time to time Commissions to inquire fully into the state of laws in force and the administration of justice in the British possessions in India and to make reports thereon.⁸⁸ T. B. Macaulay was the president of the body of these (First) Indian Law Commissioners.

By virtue of this Act as well as subsequent ones, Law Commissioners were appointed respectively in 1834, 1853,⁸⁹ 1861 and 1879. Of these four Commissions the first and the last worked in India while the second and the third had their sittings in England. No Indians were employed as Commissioners, and the law of England was used as the basis.⁹⁰

The provisions of the Code Penal of France, the decisions of the French Courts of Justice, the Livingston's Code for Louisiana and the criminal law of England were made use of while preparing as well as revising the Draft Indian Penal Code.⁹¹ Mahomedan penal law functioning in the British Indian courts of the time, though much modified, could not exert its influence in the minds of the Law Commissioners. The Draft Indian Penal Code taking shape in August, 1835, was passively accepted by the country without any marked degree of approbation or opprobrium.⁹²

In accordance with the suggestions of the Law Commissioners as per their letter to the Governor-General dated 14 October, India, 20 January, 1876

⁸⁷ Section 40 of the Charter Act of 1833

⁸⁸ Section 53, *ibid.*

⁸⁹ Section 28 of the Charter Act of 1853

⁹⁰ Page 8 of the *Second Report of the Second Law Commission* dated 13 December, 1855. Instructions of the British Government to the Third Law Commission

⁹¹ *First Report on the Draft Indian Penal Code*, pp. 1 and 2

⁹² *Samachar Durpon*, August 29, 1835

1837, the Government of India invited suggestions from experienced and judicious persons as regards the Draft Indian Penal Code submitted to the Governor-General in May, 1837. The Commissioners were required⁹³ to submit their report on the criticisms and comments submitted to the Government by the different persons holding positions in the different parts of India.

The Law Commissioners accordingly submitted their First and Second Reports on the printed Draft Indian Penal Code respectively on 23 July, 1846, and 24 June, 1847. The first report examined some of the chapters of the Draft Indian Penal Code, and the second the rest of the work.

The authors of the Draft Indian Penal Code observed that the difficulty of procuring good translations would be great.⁹⁴ By some, the Draft Indian Penal Code was found absolutely untranslatable.⁹⁵ According to the *Hindoo Patriot* dated January 29, 1857, the promises of simplicity, completeness and general intelligibility which the codifiers make of their work, failed grossly when brought to the test of practical application.

As regards the speed of work of the First Indian Law Commission, it was observed in the *Indian Reform—No. 1*⁹⁶ that "The Code prepared by the Commission was first submitted to the Supreme Government in May, 1837; it was sent back for revision; it was returned in the October following. It was then sent however to the Court of Directors and the Board of Control; it was next returned to India with Home observations and criticism. Calcutta considered it once more, and sent it back to London; and finally after eleven years' deliberation, it reached India in 1848. And it has been lying smug and dusty on the shelves of the Council ever since."

J. B. Norton of the Madras Bar observed that the salary of the Law Commissioners had already reached the enormous total of

⁹³ See the prefatory address of Law Commissioners submitted to the President of the Council of India in Council while forwarding the First Report on the Indian Penal Code under date the 23rd July, 1846

⁹⁴ Members of the Law Commission in their prefatory address to the Governor-General in Council dated 14 October, 1837 while forwarding the printed copy of the Draft Indian Penal Code

⁹⁵ *First Report on the Penal Code* by the Law Commissioners, p.23

⁹⁶ *Government of India Since 1834* p. 16

was extended to appeal suits as well. Thus it may be said that in the year 1793 the Company's government reached an opposite extreme as to the costs of justice as contrasted with the Mughal administration.

Justice being rendered so cheap the provincial adawlut were almost instantaneously inundated with a flood of lawsuits. Had it remained as costly as in the pre-1793 days a large portion of them might have been amicably settled between party and party without going to law. The proposal of a free distribution of justice attracted litigants from all quarters of the District, so much so at one time the file of the judge's court at Burdwan revealed an accumulation of 30,000 cases awaiting determination.¹⁰⁰ Under the new Regulation enjoining a separation of Collector's and Judge's functions, the revenue disputes were not transferred to the Judge's court. In the circumstances great delay was being experienced in the disposal of the revenue disputes. This delay in justice not only affected the revenues of the Government but also the interests of the people. In Burdwan, consequently, an additional court of justice had to be established. To discourage undesirable litigation and to earn a revenue by a compulsory sale of stamps a new Regulation was enacted in 1795 re-introducing an institution fee and fees on exhibits rendering law more expensive.¹⁰¹ With the idea of increasing the revenue derivable from stamps it was ordained that the pleadings in civil suits tried by the 'registers' and the judges of the city and zillah courts, in the courts of appeal as well as all other petitions presented to these courts were required to be written on stamped paper varying in costs according to size and description. Cases requiring speedy decisions such as claims on rent, for possession of land and such other causes to be decided in the first instance were allowed to be summarily disposed of, thus avoiding the necessity of incurring a cost which would be unavoidable in the forms of deliberate proceedings of a regular suit. Plaintiffs or appellants allowed to proceed *in forma pauperis* were exempt from the expenses of a regular suit.

¹⁰⁰ Letter from the Collector of Burdwan to the Board of Revenues, 27 February, 1795, Appendix No. 6 to the Fifth Report, 1812

¹⁰¹ Regulation XXXVIII of 1795

When the Company's Government promulgated Regulation XXXVIII of 1795 rendering law expensive, one of the reasons, as we have seen, assigned by the authorities was that the expensive-ness of lawsuits would prevent the litigious public from having an unusual recourse to law undeterred by considerations of costs. The Government, however, erred when it assumed that costliness of justice would discourage recourse to law only where the cause of action was not well-founded. Costliness of justice thus prevented not only the weaker claims but also the shorter purse. According to T. Pattle, litigiousness was encouraged by the increased expense of lawsuits, in the hope that the certainty of the expense, added to the uncertainty of the result, might deter parties from demanding even just rights.¹⁰²

Regulation XXXVIII of 1795 revived the original fees by way of deposit or commission for the filing of suits. The Administration demanded the submission of the above fees within a limited time and thus disabled the majority of the plaintiffs to turn up with the money in time. In this drastic way the courts got rid of a huge number of cases by dismissing them for the non-arrival of the parties fulfilling the requirements. The number of cases pending in the file was thus artificially reduced for the time being to a manageable extent. In 1797 the commission or fee to be paid on the institution of suits was considerably enhanced and extended to the proceedings of the head native commissioners. The new law further required that all legal proceedings in the superior courts including those of the city and zillah judges would be written on stamped paper as produced, provided and prescribed by the Government.¹⁰³ The Government further limited the scope of appeal to the higher courts. All these limitations working against the litigating public could not however dissuade them from taking recourse to courts of law on a scale which still looked formidable to the Company's Administration.

The Bengal Regulation XXXVIII of 1795 imposing an institution fee in civil suits was replaced by Bengal Regulation VI of 1797 converting the institution fee into stamp duties. Ben-

¹⁰² Answers from the Moorshedabad Court of Appeal and Circuit dated 26 January, 1802, to the Interrogatories of Lord Wellesley,

¹⁰³ Regulation V of 1797

gal Regulation X of 1797 imposed duties on criminal suits and Regulation II of 1798 on applications for review. These Regulations were replaced by Regulations I of 1814, XV of 1816, IV of 1817, XIV of 1824 and II of 1825. All these Regulations were repealed by Regulation X of 1829 which consolidated the law of fees in Bengal. Duties were imposed on suits for realization of rent by Regulation VIII of 1831. These Regulations were mostly concerned with an enhancement of revenue on account of stamps. Only Regulation XV of 1845 exempted Indian officers and soldiers from payment of stamp duty. Meantime other Provinces were also having their own legislation in the matter. Act XXXVI of 1860 repealed the Provincial Regulations and enacted the law for the whole of the British India. This imperial Act of 1860 was followed by Acts X of 1865, IX of 1863, X and XVIII of 1865 and XXVI of 1867. These Acts, again, extended the area of judicial taxation instead of ordering a remission. Act XXVI of 1867 was repealed by the Court Fees Act of 1870 which again was modified by Act XVII of 1870.

The attention of the Company's Government here and also of the Court of Directors at London had been from time to time drawn by Englishmen, holding responsible positions under the Company's Government, to the evils of an expensive and protracted system of administration of justice obtaining in the Provinces of Bengal, Bihar and Orissa. The Judge and Magistrate of Midnapur in his report dated 30 January, 1802, addressed to George Dowdeswell, Secretary to Government in the Judicial Department, observed that owing to the introduction of the compulsory use of the expensive stamped paper delays occurred in delivering answers, replies and rejoinders resulting in protracting the trial for days together. The litigants had to sell their silver rings or brass or copper utensils to meet the costs of justice. Instances were not unknown where the Judge and Magistrate was solicited in the court to accept a silver ring in lieu of stamped paper. In order to save the litigants this taxation Sir Henry Strachey, Judge-Magistrate of Midnapur, proposed that the financial jurisdiction of the English 'registers' and the Indian commissioners should be extended. As the expense of litigation in the munsiff's court was, at that time, negligible, he proposed that more of these courts should be con-

stituted for the benefit of the people at large who were mostly very poor. While opining that costs in the courts of law might possibly have checked litigation he observed that it was unbecoming of the State to consider as a fair object for taxation a litigant who had already been injured and sought justice at the door of the Government. Nor could it console the aggrieved party to learn, he held, that justice was made costly only to deter the litigious public from going to law when they could compose* their differences by arbitration. As the causes of civil suit presented before the Judge-Magistrate seldom originated from a spirit of litigiousness and when some of them, probably five per cent. of the total causes, so arose at all they were instituted by men who were rich, and not by men who were poor, it behoved the Government, observed Sir Henry Strachey, to appoint more judges rather than to have resolved to enhance the costs of justice in a way as to deter the poorer section of the community from having recourse to a court of law. Fifty per cent of the litigants in the civil courts in the District of Midnapur intended to appear as paupers. But as the Regulation XLVI of 1793 required that no litigant would be allowed to proceed as a pauper unless he brought two witnesses to attest his poverty and two securities for his appearance, and as the expenses of maintaining himself and the witnesses and securities at the sadar district town, where the court of judicature was situated, were too much for one deserving of the concessions intended for a pauper, the provisions of Regulation XLVI of 1793 were in this way unavailing. The parties, moreover, sometimes had to stay at the sadar town for more than two or three months at a stretch for the determination of a single suit.

This was the state of things in the three Presidencies of Bengal, Bombay and Madras. *The Memorandum of the Improvements in the Administration of India during the last thirty years* submitted to Parliament in 1858 on behalf of the East-India Company on the eve of the British Parliament's acquisition of direct administration of British India held that only the Regulation Provinces had been suffering from the defects and, quoting Sir John Lawrence's *Report on the judicial system of the Punjab*, that the Non-Regulation Provinces had got from the period of annexation a system of judicial administration

which was cheap, accessible, and expeditious, free from unnecessary formalities and technicalities. The Report of Sir John Lawrence gave an impression that no improvement was left undone. According to Sir John, the cost of justice in the Punjab averaged only Rs. 5 - 0 a - 1 p. per cent. of value of suits during 1854 and Rs. 4 - 13 a - 3 p. per cent. during 1855.

The costliness of the system of British administration of justice in India had been pointed out to the authorities time and again. But in the plea of revenue considerations the system could not be changed to any appreciable extent. Thus in the House of Lords in 1886, Lord Fitzgerald moved a resolution for a return of the taxes and duties raised or levied upon the administration of justice in India for the year 1885 whether by stamps, *ad valorem* duties, or otherwise, under the Court Fees Act of 1870 and other Acts, if any. His Lordship further proposed in the resolution that the subject of the taxation of justice in British India might be referred to the Select Committee on the operation of the Act for the better Government of India, 1858 and other Acts relating to India. Lord Fitzgerald further observed that as a member of the Indian Committee sitting in 1853 he was in a position to inform the House that petitions were presented to the Committee from Indian subjects relating to the taxation of justice and that Pestonjee, a leading Indian witness before the Committee of 1853, in giving his evidence represented that the taxation of justice sometimes rose up to 32 per cent. of the amount disputed. His Lordship held that the worst of all taxation was that on the administration of justice preventing as it did the bulk of the community who were poor and oppressed from getting the protection of the law and that this state of things continued for all the time of British rule in India. The mover of the resolution proved by statistics that the cost of justice could be conveniently reduced without the Treasury incurring any deficit or debt on that account. The Secretary of State for India, the Earl of Kimberley, while admitting that the matter undoubtedly required attention and that complaints had been received as to the high price of justice and that these complaints had been endorsed by authoritative persons including the judicial personnel of all the courts in India among whom was the Chief Justice of the High Court of

Judicature at Fort William in Bengal, requested the mover to withdraw the motion on the ground that the Government would give a careful consideration to the subject, though question of revenue could not be left out of sight. With this assurance his Lordship withdrew the motion.¹⁰⁴

The Select Committee, submitting its Fifth Report in 1812, having examined the past records of the courts came to find that on January 1, 1802, the number of causes pending trial before the five courts of appeal was 882; before the judges of 28 city and zillah courts 12,262; before the 'registers' of these city and zillah courts 17,906; and before the Indian commissioners 131, 929. In spite of the restrictive measures taken against the litigating public in the form of enhanced taxation for litigation the arrears of work were found unmanageable. It was found on December 31, 1802, that the number of cases pending trial in the zillah courts of Trihoot under Patna Division, of Dacca Jallalpoore under Dacca Division, and of Bahar under Patna Division exceeded the total number of cases decided and dismissed from the file in course of the preceding five years.¹⁰⁵ This was no doubt due to the abolition of the indigenous system of settling disputes and to the paucity of judicial personnel entrusted with the administration of law under the Company's rule. In order to expedite the determination of causes provision was made for the appointment of a temporary Assistant Judge, where necessary, to work of arrears. The judges were allowed at the same time to delegate a greater number of causes involving sums exceeding Rs. 50/- to the Indian commissioners and also to provide for the causes of smaller value for a speedy settlement by arbitration. This state of things soon drew the attention of the Court of Directors who in their letter dated 14 September, 1803, addressed to the Government of Bengal, remarked that, allowing the time usually taken by the judges in Europe, it could be safely said that the cases pending in the courts could never be heard and determined within the lifetime of the judges or the litigants. The same situation arose in the Presidency of Fort Saint George. With the picture of the arrears before

¹⁰⁴ Debates, House of Lords, March 23, 1886

¹⁰⁵ Government of Bengal's letter to the Court of Directors, 30 September, 1803

their eyes the Court of Directors had to confess that it was better to leave the Indian people to their native tribunals than to harass their feelings and injure their property by an endless procrastination of their suits under the pretext of a more deliberate justice.¹⁰⁶

Another feature of the British administration of justice in Bengal in those days may as well be noted. From the beginning of the British administration the question was mooted whether and how far the separation of the judicial functions from the executive was desirable and feasible.

In 1786, Districts were formed as administrative units and the heads of the Districts, with the exception of the three Courts at Moorshedabad, Patna and Dacca, were to be vested with the functions of Collector, Judge, and Magistrate. The separation of the administration of justice from the collection of revenue had resulted in administrative difficulties. Revenue could not be collected with regularity. Any delay in payment of the revenue by the people had to be remedied by the due process of law and no force could be applied for the collection thereof. Delay in the collection of revenue was rendered inevitable where judicial power had been vested in an independent officer instead of the collector of revenue. In order to obviate these difficulties, judge's and collector's functions were combined in the same person in the year 1787.¹⁰⁷ Separation of functions and therefore of powers was considered to be too utopian a scheme for the state of things of Bengal of those days. One sole authority had to be installed in the District as the despotic head.¹⁰⁸ The Collector-Judge had to engage himself more seriously with collection of revenue than with the adjudication of disputes. His promotion depended upon the efficiency he showed in the realisation of the public dues. His ability as Judge-Magistrate failed in those days to draw the attention of the Board of Revenue and the Government. The Collector-Judge, consequently,

¹⁰⁶ Court of Directors' Revenue Despatch to Fort St. George, 26 March, 1812; Report of Seton, Judge of Circuit for Patna Division, 20 June, 1798

¹⁰⁷ Judicial Regulation, dated, June 27, 1787

¹⁰⁸ Sir John Shore's (Lord Teignmouth's) Remarks on the mode of administering justice to the natives of Bengal, and on the collection of revenues delivered to Sir J. Macpherson, January, 1782: *Bengal Revenue Consultations*, 29 May, 1785

must have shown some amount of sympathy for the landholders and farmers of revenue in their rent disputes with their under-renters and tenants. Similarly in all complaints of exaction and oppression in the collection of the revenue and land rents, the administration of justice must have been marked with an element of indifference to the interests and feelings of the revenue and rent-paying people.¹⁰⁹ The evil consequences that might follow from the combination of these two functions were a few years later clearly perceived by Lord Cornwallis in his scheme of judicial reforms in 1793. His Lordship was of the opinion that the political security of the British Empire in India could be assured only by securing the happiness and prosperity of the general people and that for such a state of things a general obedience to the Regulations on the part of the people as well as the rulers was considered indispensable.¹¹⁰ The Marquis of Cornwallis accordingly separated the two functions, vested the collection of revenue in one person and the administration of justice in another, abolished the *mahl adalats* (revenue courts) having transferred to the dewani adawlut all the cases hitherto cognisable by the revenue officers. Thus in 1793 the judicial and magisterial functions were removed from the Collector and vested in another officer to act as a judge-magistrate except in case of jail deliveries which had been the jurisdiction of the court of criminal law.¹¹¹ Later the functions of the Magistrate were separated from those of the Judge, the latter being made a Court of Sessions for trying serious cases of crimes, the other crimes being retained for the Magistrate. The functions of the Magistrate and of the Collector were again united in 1835. From this period onward the Magistrate-Collector exercised those combined functions together with the administration of revenue involving judicial powers for the exercise of the same. The District Magistrate and Collector was, in addition, responsible for the peace and administration of the District. Because of this multiplicity of engagements delays became inevitable in criminal trials. This difficulty of the delay has continued till date.¹¹²

In the history of the British Administration of India the sepa-

¹⁰⁹ Harington: *Analysis*, Vol. I, pp. 35, 56

¹¹⁰ Preamble of Regulation II of 1793 ¹¹¹ Regulation II of 1793

¹¹² Paragraph 314 of *Report of the Bengal Administration Enquiry Committee*, 1944-45

ration of judicial and executive functions had been, as noted before, a vexed question. The late Manomohan Ghose made a collection of facts and opinions on the subject for a period extending well over a century. A compilation of authoritative opinions and statements on both sides of the question (1783-1900) with notes of some of the most flagrant causes illustrative of the evils and damages of the union of the functions and a few judicial pronouncements thereupon and the resolutions of the Indian National Congress on the subject was also made by the late Prithwis Chandra Roy.¹¹³ The combination of the two institutions in the same person in a country where the Government had failed to secure the affection of the most of the people governed and was therefore suspected of diabolical activities sometimes gave birth to more misgivings than were perhaps really justifiable. It had been suggested that for the sake of a good name on the part of the Administration the two institutions should be separated.

Having accepted the said factual limitations of the British administration of justice in Bengal we may now turn to some of the redeeming features of the said administration.

In the eighteenth century when the Englishmen took over the administration of the Provinces of Bengal, Bihar and Orissa, England's was, in the realm of legal administration, the age of reason,¹¹⁴ and this reasoned attitude of the Administration had given India a good start in the matter of evolution, application and administration of law. At 'Home', at the point of time, the judges were depending upon their conscience and reason.¹¹⁵ The reasoned application of principles to the facts of the case before the courts and a scrupulous adherence to jurisdiction became by the time a normal feature in England, and judges brought up or initiated in such an atmosphere took over, at the superior court level, the task of the legal administration of this country.¹¹⁶

¹¹³ *The Separation of Judicial and Executive Functions in British India*, compiled and edited by Prithvis Chandra Raya, Calcutta, 1902

¹¹⁴ Dr. Harold Potter: *The Quest of Justice*, p. 4

¹¹⁵ Duke of Norfolk's Case 3 Ch. Cas. p. 47

¹¹⁶ Sparrow v. Hardcastle (1752) Amb. 228; F. Pollock: *The Expansion of the Common Law*, p. 133, cited Sir William Holdsworth: *Some Makers of English Law*, 1938, p. 3

The juridical outlook of the legal administrators was responsible for keeping the English judges from any racial prejudice. The highly sensitive Bengali community does not seem to have had any occasion for censuring any English judge for his racial prejudice before 27 August, 1861, on which date a representative meeting of the Bengali community was held at Sovabazar, Calcutta, in order to transmit to the Secretary of State for India in a memorial its resolution of no-confidence in Mr. Justice M. L. Wells of the Supreme Court for his unjudicial utterances.¹¹⁷

In the first phase of its administration the Company looked more for the working of the law as operative from the succeeded Mahomedan regime than for its abstract content. To use the words of Mr. Justice Arthur T. Vanderbilt, of the United States, the Company had to evolve and apply the minimum standards of practical application and not something academic in their nature.¹¹⁸ The administration having settled into shape the Company next directed, as we have seen, its efforts towards the reformation of the existing law in the light of the social norms prevailing in England at the time. Subscribing to the tenets of what has been later known as pragmatism or functional attitude or approach the Marquess of Wellesley as Visitor to the College of Fort William observed:

"Subject to the common imperfection of every human institution, this system of laws is approved by practical experience, (the surest test of human legislation), and contains an active principle of continual revision, which affords the best security for progressive amendment. It is not the effusion of vain theory issuing from speculative principles, and directed to visionary objects of impracticable perfections: but the solid work of plain, deliberate, practical benevolence; the legitimate offspring of genuine wisdom, and pure virtue."¹¹⁹

The great administrators were thus motivated by the points of view expounded, later, by jurists like Holmes, Cardozo,

¹¹⁷ *The Bengal Hurkaru*, and *India Gazette*, August 27, 1861

¹¹⁸ Vanderbilt, J., *Introduction to Minimum Standards of Judicial Administration*, 1949, p. xxviii; *vide* also his Foreword to the Seven Reports of the Committees

¹¹⁹ Quoted, Harington: *Analysis: Introduction*, *See* also *The Governor*.

Pound¹²⁰ and Stone who have been noted for their emphasis, that the life of the law has been experience and that "experience alone can tell whether a given set of postulates ought to be granted".¹²¹

To give a consolidated account of the subject, we have to allude also to the efforts exerted in the matter of judicial and legal administration by the Press and the people. The Indian Press with its very emergence began truly to ventilate the public opinion of the time on the matter of social reforms.¹²² Even the *pardanishin* ladies availed themselves of the Press to give their views on the social and economic problems of the time.¹²³

The Indian Press made it a part of their job to acquaint the people with the laws and lawsuits in India, and the established laws and customs of Great Britain. It also tried to acquaint the Company's Government with the laws, customs and condition of the people here. A comparative study of judicial precedents was also sometimes made.¹²⁴ The prospectus of the *Mirat-ul-Ukhbar* and the first number of *Sambad Cowmody* revealed the nature of their usual contents clearly showing that law and justice would occupy their due place in their day to day publication.¹²⁵ By giving publicity to corruption and injustice in the administration and by suggesting the introduction of new measures the Press discharged the function of a social reformer.¹²⁶

General's letter to the Court of Directors, May 29, 1810; Rule 35 of the Hastings's Plan of 15 August, 1772; Letter from the Committee of Circuit to the Council at Calcutta, 15 August, 1772; the letter of the Magistrate of Dacca-Jallalpoore to the Government of Bengal in 1802, Fifth Report, 1812, Vol. I, p. 127; Minutes of the Governor-General in Council, 24 November, 1810

¹²⁰ Roscoe Pound: The Scope and Purpose of Sociological Jurisprudence, 25 *Law Q. Review*, 1911, p. 489

¹²¹ Dr. Julius Stone: *The Province and Function of Law*, 1946

¹²² *Prabhakar*, 19 November, 1831. *Samachar Chandrika*, 28 February, 1835. *Gyananeshun*, 23 April, 1836, 21 October and 16 December, 1837

¹²³ *Samachar Chandrika*, 5 January, 1828. *Samachar Durpon*, 4 December, 1830, 19 February, 1831, 14 and 21 March, 1835

¹²⁴ *Samachar Durpon*, 13 August, 1831

¹²⁵ *Calcutta Journal*, May 14, 1822; J. K. Majumdar: *Rammohan Roy and Progressive Movements in India*, 1941, pp. vii, xvi

¹²⁶ *Sambad Cowmody*, 4 December, 1821; *Calcutta Journal*, 21 Decem-

The trial by jury as obtaining in England was appreciated and compared with the Mughal administration. The Indian Jury Act of 1826 received the attention of a considerable section of the Indian Press.¹²⁷ The journals of the age reported almost all sorts of trials whether in the Supreme Court at Calcutta or in the courts of justice in the mofussal¹²⁸ and commented on the irregularities and inconveniences of the judicial administration, where any.¹²⁹

As distinct from the Press, the public organisations as well as the personalities of Bengal of the time attempted by way of constructive criticism to help reform the judicial administration of the Province. Thus pursuant to the Resolution of the Bengal British India Society passed on 5 January, 1844, to the effect that a Committee of the said Society would collect from all available sources and print in the form of a pamphlet the evidence relating to the efficiency and character of the Native Agency in the administration of the affairs of this country for transmission to England, in support of the Petition earlier sent through George Thompson to the Proprietors of the East-India Stock, praying for effect to be given to Section 87 of the Charter Act of 1833, the Committee of the Bengal British India Society compiled a selection of evidences from papers relative to the affairs of the East-India Company and other publications on Indian subjects and got them published under its own superintendence. The pamphlet¹³⁰ of the said Committee quoted a number of authorities who had expressed themselves in favour of the opinion that Indians had shown their ability as administrators during the Company's rule of the British Indian possessions.¹³¹ The

ber, 1821; No. IV *Mirat-ul-Ukhbar*; *Calcutta Journal*, May 14, 1822

¹²⁷ *Sambad Coumody*, December 4, 1821; *ibid.* December 11, 1821; *ibid.* December, 30, 1826; *Bengal Chronicle*, July, 1827; *Oriental Herald*, July and August, 1827; *Samachar Durpon*, September 15, 1832; *Asiatic Journal*, September, 1833

¹²⁸ *Calcutta Journal*, March 19, April 5, 25 and June 1, 1822; *Sambad Coumody*, issues XV, XVIII, XXI, XXVII, XXVIII and XXIX

¹²⁹ *Mirat-ul-Ukhbar* No. IV; *Calcutta Journal*, May 14, 1822; *Ranga Darshan*, Pous, 1279 B. S. (Dec.-Jan. 1872-73)

¹³⁰ *Evidences relating to the Efficiency of Native Agency in India*, published under the Superintendence of the British India Society, Calcutta, reprinted, with a supplement, by the British Indian Association, 1853

¹³¹ Sir Henry Strachey, Judge and Magistrate, Calcutta Division, Zilla Mid-

pamphlet was reprinted in 1853 with a supplement by the British Indian Association.

The Society's Committee also prepared a table compiled from the printed Decisions of the Sudder Court at Calcutta, exhibiting the comparative merits of the judgments of the covenanted European judges and the uncovenanted Principal Sudder Ameens who consisted almost entirely of Indians. The figures covered the period of 7 years 1845-1851 and showed that 19 per cent. of the decisions of the European judges were confirmed and 80 per cent. reversed by the Sudder Dewanny Adawlut, but that 25 per cent. of the decisions of the Indian judges of the higher grade were confirmed, and 64 per cent. reversed.

napur, in reply dated 30 January, 1802, to the Interrogatories circulated by Lord Wellesley in 1801; Letter from the Court of Directors to the Governor in Council at Fort Saint George, 16 December, 1812; Evidences of J. Neave, B.C.S.; T. H. Ernest, B.C.S. R. W. Cox, B.C.S.; Sir Henry Strachey J. G. Ravensaw, M. C. S.; W. Thackeray, M. C. S.; and Colonel A. Walker, Bombay Service, before the Special Committee of the Court of Directors appointed shortly after the renewal of the Company's Charter in 1813 for the purpose of instituting an inquiry into the Administration of Justice and Police that had been established in India; Lord Moira, in his Judicial Minute, dated 2 October, 1815; Chief Secretary Bayley in his Memorandum dated, January, 1821; The Court of Directors in their despatch in the Judicial Department to the Bengal Government, dated July 23, 1824; Letter in the Revenue Department from the Governor-General in Council to the Court of Directors, June 29, 1826; Judicial Letter to the Court of Directors from the Government of Bengal, dated 5 October, 1826; Judicial Letter to the Court of Directors from the Government of Bengal, 7 December, 1826; Major-General Briggs in an essay read before the Bengal Asiatic Society in 1826; Judicial Letter to the Court of Directors from Fort Saint George, 27 April, 1827; Public Letter to Bengal from the Court of Directors, 18 February, 1829; Butterworth Bayley in his Minute, 5 November, 1829; John Bax, Member of the Calcutta Finance Committee, in his Minute in 1829; Letter in the Public Department from the Court of Directors to the Governor in Council at Fort Saint George, 29 September, 1830; Alexander Ross in his Minute when a Judge of the Sudder Court; H. M. Turnbull, Judge Bart., B.C.S.; E. Strachey, B.C.S.; J. D. Erskine, B.C.S.; G. Read, M.C.S.; of the Sudder Court, in his Minute dated 15 January, 1830; David Hill, Member of the Calcutta Finance Committee, in his Minute, 8 March, 1830; Holt Mackenzie, Member of the Calcutta Finance Committee in his Minute dated 1 October, 1830; Sir John Malcolm, Governor of Bombay in his Minute 10 November, 1830; Extracts from the digest of the evidence given before the Lord's Committee in 1830; Extracts from the digest of evidence given

At the context, we are speaking of a time when the national struggle for independence was not conceived of. The masses in general were indifferent to such awakening and were satisfied with the maintenance of public order. The historical records, including the Fifth Report of the Select Committee, 1812, reveal that only the deposed ruling and official classes were unhappy on the in the Second Report of the Commons' Committee on East-India Affairs, in 1830 and 1831; The Calcutta Finance Committee in their letter dated 12 July, 1830, to the Governor-General in Council in Bengal; Evidence of Thomas Fortescue, B.C.S., before the Select Committee of the House of Lords, in 1830; Ross Donnelly Mangles, B.C.S.; Courteney Smith, B.C.S., Richard Clark, M.C.S.; The Hon'ble Mountstuart Elphinstone, Governor, of Bombay; William Chaplin, M. C. S.; John Hodgson, M. C. S.; and Robert Rickards before the Select Committee of the House of Lords in 1830; Letter in the Revenue and Judicial Department from Lord W. C. Bentinck, Governor-General of India, to the Court of Directors, dated Simlah, 15 September, 1831; W. H. Macnaghten, Secretary to the Governor-General in his letter to the Deputy Secretary of the Bengal Government, dated 26 January, 1831; Lord William Bentinck, W. B. Bayley, Sir Charles Metcalfe in their letter dated 9 October, 1831, to the Judges of the Supreme Court, suggesting for their consideration certain alterations and additions in their Bill to be entitled an Act for establishing Legislative Councils in the East India; Evidence of John Sullivan, Collector and Magistrate of Coimbatore, before the Select Committee, in 1831; Evidence of W. Chaplin, who held offices for years in the Madras and Bombay Presidencies, before the Select Committee in 1831; W. Blunt in his Minute dated 24 March, 1831; Robert Rickards, Member of Council in Bombay, who was in the service of the East-India Company for about 23 years in his evidence before the Select Committee in 1831; Major-General Sir Lionel Smith, who resided in Western India for over twenty-two years, in his evidence before the Select Committee in 1831; Judicial Letter to Bengal from the Court of Directors, 1 February, 1832; The Select Committee in their Report (ordered to be printed on the 16th August, 1832) being the digest of evidence before them; Letter from the Hon'ble M. Elphinstone to J. Hyde Villiers dated 5 August, 1832; Letter from Francis Warden, formerly Member of Council at Bombay to J. Hyde Villiers, dated 3 April, 1832; Letter from John Sullivan, M. C. S., to J. Hyde Villiers, dated 21 February, 1832; William Butterworth Bayley; Thomas Fortescue, B. C. S.; Sir Alexander Johnstone, who held offices of the highest responsibility and trust for 16 years in Ceylon, and whose last appointment was the President of his Majesty's Council at Ceylon; James Mill; C. Lushington, B. C. S.; A. D. Campbell, M. C. S.; N. B. Edmonstone, B. C. S.; David Hill, M. C. S. Richard Clarke, M. C. S.; and Holt Mackenzie, in their evidence before the Select Committee in 1832; Raja Rammohun Roy before the grant of the Charter in 1832; The Hon'ble F. J. Shore in his Notes on Indian Affairs, reprinted in 1836; Lord William Bentinck before a Committee of the House

issue of foreign rule.¹³² As against the feelings of these deposed ruling and official classes, even the *elites* of Bengal of the succeeding regime occasionally assembled in public meetings and avowed themselves to be the co-operators in the formation and continuance of the Company's rule.¹³³

Acquisition and expansion of the English possessions in India were pursued by the East-India Company with the connivance, aid and supervision of the Government of Great Britain¹³⁴ and in harmony, as far as possible, with the interests of the people here.¹³⁵ Political expediency and humanitarian considerations, though irreconcilable among themselves, were the two principal guiding factors for the Administration. Logic in the sense of consistency could not be the sole aim.¹³⁶ As far back as 1799 and 1804, Regulations were passed for the trial of persons charged with crimes against the State, empowering the Governor-General to suspend the ordinary function of the criminal court, to declare state of emergency,¹³⁷ to introduce martial law for the suppression of rebellion and to detain persons without trial where such detentions were found necessary.¹³⁸

of Commons in 1837; Dr. H. H. Spry in his *Modern India*, 1837; Letter of the Government of Bengal dated 27 June, 1842, containing remarks on the Report of the Sudder Court for 1841; The Sudder Court in its Report on the Administration of Civil Justice in territories subject to the Government of Bengal during the year 1841; The Report of the Sudder Dewanny Adawlut, North-Western Provinces, on the Administration of Civil Justice for the year 1841; The Report of the Sudder Dewanny Adawlut, North-Western Provinces, on the Administration of Civil Justice for the year 1842

¹³² Report from Moorshedabad Court of Appeal and Circuit, 26 January 1802, in Answer to Interrogatories circulated by Lord Wellesley in 1801

¹³³ The Proceedings of the public meeting of the Bengali Community held on 29 July, 1853, at the Town Hall, Calcutta

¹³⁴ Colonel Clive's letter to the Right Hon'ble William Pitt, January 7, 1759

¹³⁵ Lord Cornwallis's Despatch to the Court of Directors, 2 August, 1789; Charles Hamilton: Preliminary Discourse, *Hedaya*, Vol. I, London, 1791

¹³⁶ *Per* Stanley Baldwin: House of Commons, 8 February, 1932; Earl Baldwin, May, 1937

¹³⁷ Act IX of 1857

¹³⁸ Regulation III of 1804, *See also* The East-India Company's Act, 1780 (21 Geo. III c. 70); The East-India Company's Act, 1793 (33 Geo. III c. 52); Bengal State Offences Regulation, 1804 (Reg. X of 1804); Madras Regulation VII of 1808; Foreign Immigrants Regulation, 1812 (Reg. XI of 1812); Re-

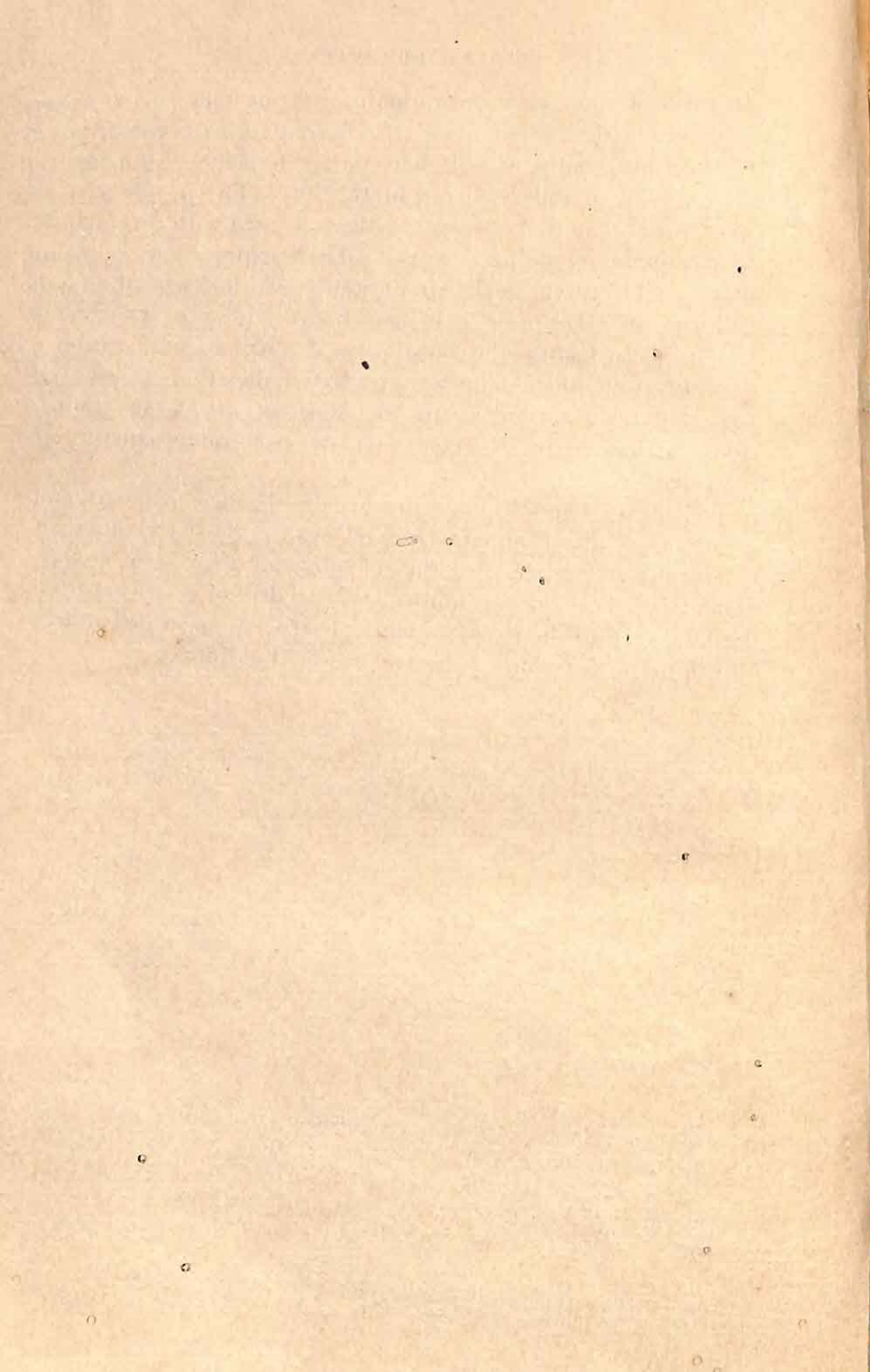
In cases of emergency the formalities of military law were conspicuous in their absence.¹³⁹ Even civilian officers with power of life and death abused their power ferociously during the Indian War of Independence in 1857.¹⁴⁰ The people at large were however in times of peace little concerned with this inequity of treatment on political level. Their expectations were not many. They were in the circumstances satisfied with the establishment of a regime where legal safeguards were available to the subjects against the possibility of governmental arbitrariness. The individual rights were protected, they found, by an impartial judicial authority, and in like situations like determinations emanated from the courts of law, establishing equality of treatment in law.

The ideal of equality was pursued by the British judges and governors of the Company's period against the background of a given social order, and the blending of these two factors, namely, an accepted social order and the ideal of equality before the law, gave to the people a sense of satisfaction on the subject of the administration of justice by the Englishmen.

gulation III of 1818 (State Prisoner's Regulation); Madras Regulation II of 1819; Bombay Regulation XXV of 1827; Act XVIII of 1841; State Prisoners Act (XXXIV) of 1850; State Offences Act (XI) of 1857; Act XXVIII of 1857; Winston Churchill: City Speech, 11 December, 1930; Sir Michael F. O'Dwyer in Foreword to *India at the Parting of Ways* by Lt. Col. John Alfred Wyllie, 1934

¹³⁹ Sir George Campbell: *Memoirs of My Indian Career*, p. 132

¹⁴⁰ Edward Thompson: *The Other Side of the Medal*, 1925



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EXTRACT FROM THE INTRODUCTION BY ROSCOE POUND
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. . . . It is a significant evidence of real progress in the science of law that in free India of the second half of the present century we are getting in Mr. Patra's text a history of the administration of justice in a leading jurisdiction in India instead of history of the law, *i.e.*, of the statutory and judicial and doctrinal patterns of decision and starting points for legal reasoning, leaving the law in action to take care of itself. Such a study is of more than local importance. It yields materials which must be utilized in comparative law. But it is of prime value at home where it can give a trustworthy historical picture of what the Indian legislator and judge and text-writer must start from.

The author refers to the expensiveness of the justice administered during the period covered. India is not alone in having to wrestle with the high cost of justice in a time when the welfare state is making ever increasing demands upon the proceeds of taxation.

Another problem which, if not universal, is general in the common-law world is the common-law doctrine of the Rule of Law, or, as I prefer to call it, the Supremacy of Law, in view of the increasing multiplication and all-embracing activities of administrative agencies in the Government of today

In his recent book *Law and Social Change in Contemporary Britain* Professor Friedmann tells us that two principles are essential to democratic society: (1) The safeguarding of protected individual interests by impartial judicial authority and (2) the principle of equality before the law of those who engage in comparable legal transactions and enterprises. The sound kernel of Dicey's doctrine is that the common law judicial process goes far to secure these where the administrative process of adjudication does not in the United States.

The author takes up subjects which make a contribution to comparative law in the best sense of that term. It has been a privilege to read it and think about it.

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